No. 78-1252

In the
Supreme Court of the United States

October Term, 1978

EDWARD Q. LUPIA,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC.,
a New York corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX

(Separately Set Forth In Appendix Volume)

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STATUTES

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IN THE

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To: The Honorable Chief Justice and Justices of the Supreme Court of the United States:

Edward Q. Lupia, petitioner herein, respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on November 15, 1978, affirming the decision of the District Court for the Northern District of Illinois, Eastern Division, granting summary judgment in favor of the respondent (defendant below) and against the petitioner (plaintiff below) on all four counts (Counts I, II, III and IV) of plaintiff's Complaint, as amended, and denying plaintiff's cross-motion for partial summary judgment.

PROCEEDINGS & OPINIONS BELOW

Petitioner, Edward Q. Lupia, was an exclusive distributor of defendant's ethnic bakery products in the Chicago metropolitan area from 1961 until 1972. Defendant, Stella D'Oro Biscuit Co., Inc., is a New York corporation, engaged in the manufacture and sale of a dietetic and ethnic line of cookies, biscuits and breadsticks. In 1972 Lupia brought an action against Stella D'Oro, alleging that Stella D'Oro's pricing and marketing practices had violated, in relationship to the plaintiff distributor, various provisions of the Federal antitrust laws, specifically Sections 2(a) and 2(c) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sections 13(a) and (c)), Section 1 of the Sherman Act (15 U.S.C. Sec. 1), and Section 3 of the Clayton Act (15 U.S.C. Sec. 14). Plaintiff seeks monetary relief under Section 4 of the Clayton Act (15 U.S.C. Sec. 15), the remedial provision allowing recovery of treble damages by "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ."

Count I of plaintiff's Complaint, as amended, charges the defendant with granting and paying discriminatory discounts (generally 5%) to certain favored chain store retailers "centrally billed" by the defendant in connection with the sale and distribution of Stella D'Oro products by the plaintiff, and with forcing the plaintiff to absorb the chain store discounts so granted by the defendant, by charging same back against plaintiff's account, in violation of Sections 2(a) and 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, and in further violation of Section 1 of the Sherman Act.

It is undisputed that the dollar amount of discriminatory chain store discounts so granted and paid by the defendant manufacturer to the favored "centrally billed" chain store retailers, and charged back by the defendant against plaintiff's account (thereby compelling the plaintiff to absorb the same) totaled $135,886.81 for the four year limitation period (3/22/68-3/22/72) immediately preceding the institution of the within lawsuit by the plaintiff.

Count III of plaintiff's Complaint, as amended, charges the defendant with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13(a)), on the ground that the plaintiff was compelled by the defendant to pay higher prices for the defendant's products, of like grade and quality, than the prices paid by certain other favored distributors of the defendant for the same products. This price discrimination was effected, the plaintiff charges, by the fact that the defendant sold its products to the plaintiff at a trade discount of only 26% compared to the higher trade discount of 29% at which defendant sold its products, of like grade and quality, to certain other favored distributors of the defendant, including defendant's distributors in the Detroit, Michigan, Cleveland, Ohio, and Pittsburgh, Pennsylvania area located in the same "geographic price zone" as the plaintiff. Plantiff claims damages from the defendant, under Count III, in an amount equal to the 3% higher price differential which plaintiff paid for defendant's products compared to the lower prices at which defendant sold its products, of like grade and quality, to its distributors in the Detroit, Michigan, Cleveland, Ohio and Pittsburgh, Pennsylvania areas. It is undisputed that said 3% higher price differential amounted to $260,127.75 for the period from 1/1/64 to 1/3/72 on purchases of $8,670,825.00 (the defendant being charged with fraudulent concealment of said price differential under Count III, as amended); or $131,528.90 for the four year period from 3/22/68 to 1/3/72 on purchases of $4,384,296.69.

Count II of plaintiff's Complaint, as amended, charges the defendant in engaging in and imposing upon the plaintiff an unreasonable and illegal "product" restraint and "tie-in" agreement or arrangement in per se violation of Section 1 of the Sherman Act (U.S.C. Sec. 1) and Section 3 of the Clayton Act (15 U.S.C. Sec. 14) in connection with the sale to and purchase by the plaintiff of certain "Lady Finger" sponge cake products manufactured by Specialty Lady Fingers Co. of Marysville, Pa., and certain "Pizzelle" wafer products manufactured by Caroline Baking Company of East Carnegie, Pa.

Count II of plaintiff's Complaint, as amended, relates to plaintiff's charge that he, as well as other distributors of the defendant, was contractually barred under the "product restraint" provisions of his distributorship agreement with defendant from selling or offering for sale "any baked products manufactured by any other persons, firm or corporation", whether or not competitive with the products manufactured by the defendant, and was able to purchase said Pizzelle and Lady Finger products of other bakery manufacturers *only through the defendant rather than directly from the manufacturer thereof.*

Count IV of plaintiff's Complaint, as amended, charges the defendant with imposing upon the plaintiff, and engaging in certain unlawful price fixing, and unreasonable territorial and product restraints in violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1), and realleges in support thereof the same basic factual averments relating thereto initially detailed and averred in Counts I and II of plaintiff's Complaint, as amended.

Both plaintiff and defendant filed motions for summary judgment in the District Court. Defendant's Motion for Summary Judgment was wholly unsupported by any affidavits. Plaintiff's Cross-Motion for Partial Summary

Judgment was supported by various affidavits, and a supporting Exhibit Volume containing some 223 exhibits.

The decision of the United States Court of Appeals, issued on November 15, 1978, as yet apparently unreported in the official reports, is set forth in Appendix "A" (infra, p. 1a). No Petition for Rehearing was filed. The Memorandum Opinion of the District Court dated May 31, 1977, which also appears to be unreported in the official reports (later supplemented by a Rule 54(b) Order entered by the District Court Judge on October 18, 1977) is set forth in Appendix B (infra, p. 18a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW

In relationship to Count I of plaintiff's Complaint, as amended:

(1) Where an independent wholesale distributor is required by his manufacturer to resell the products purchased from said manufacturer at wholesale prices "fixed" by the manufacturer, and where in connection therewith the manufacturer mandates and maintains a policy, with reference to the resale of said products by the distributor, of itself granting and paying discriminatory chain store discounts or rebates (generally 5%) to certain favored retail chain stores "centrally billed" by the manufacturer, and then charges such discounts or rebates, so granted, back against the account of the distributor so as to compel the distributor to absorb the same, whether such practice violates (i) Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13(a)), and/or (ii) Section 2(c) of the Robinson-Patman

Act (15 U.S.C. Sec. 13(c)), and/or (iii) Section 1 of the Sherman Act (15 U.S.C. Sec. 1)?

(2) Whether the distributor, under the state of facts noted above, has such "standing" and/or has suffered such an "antitrust injury" as to entitle him, under Section 4 of the Clayton Act (15 U.S.C. Sec. 15), to recover from the manufacturer the discounts and/or rebates so charged back against him by the manufacturer?

In relationship to Count III of plaintiff's Complaint, as amended:

(1) In connection with the 3% higher price differential that the plaintiff distributor paid the defendant manufacturer in connection with plaintiff's purchase of defendant's products, compared to the prices paid by other favored distributors of the defendant for defendant's products, of like kind and quality, located in the same "geographic price zone" as the plaintiff, whether plaintiff's alleged cause of action set forth in Count III of plaintiff's Complaint, as amended, as supported by plaintiff's supporting affidavits and exhibits, meets any of the competitive "injury" or "lessening of competition" tests of Section 2(a) of the Clayton Act, as amended by the Clayton Act?

(2) Whether defendant, by reason of the territorial and other restraints imposed upon the plaintiff by the defendant in this case, is thereby "estopped" from asserting lack of competition between the disfavored plaintiff and defendant's other favored distributors (who were able to purchase defendant's products of like grade and quality at a discount of 29% compared to the 26% discount given to the plaintiff) as a defense to the Section 2(a) violation charged by Count III of plaintiff's Complaint, as amended?

In relationship to Counts II and IV of plaintiff's Complaint, as amended:

(1) Whether the contractual "products" restraint imposed on the plaintiff distributor by the defendant manufacturer, which barred and prohibited the plaintiff from selling or offering for sale "*any* baked products manufactured by any other person, firm or corporation", whether or not competitive with the products manufactured by the defendant, during the terms of plaintiff's distributorship, and which barred the plaintiff from selling the "Pizzelle" wafers and "Lady Finger" sponge cakes manufactured by other bakery manufacturers, *unless purchased through the defendant,* constitute unlawful and unreasonable restraints, and/or an illegal "tie-in arrangement" in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act?

(2) Whether the imposition and fixing of "territorial restraints" by a manufacturer which barred and foreclosed the plaintiff distributor from competing with other distributors of the defendant manufacturer located in the same "geographic price zone" (fixed by the manufacturer) as the plaintiff distributor, constitutes an unreasonable and illegal restraint in violation of Section 1 of the Sherman Act?

STATUTES INVOLVED

Section 1 Sherman Act (15 U.S.C. §1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or con-

tainer of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2(a) Robinson-Patman Act (15 U.S.C. §13(a))

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold

for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And *provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal

goods, distress sales under court process or sales in good faith in discontinuance of business in the goods concerned.

Section 2(c) Robinson-Patman Act (15 U.S.C. §13(c))

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Section 3 Clayton Act (15 U.S.C. §14)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale or such condition, agreement or under-

standing may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 Clayton Act (15 U.S.C. §15)

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

I. The Factual Background:

Defendant's Motion for Summary Judgment admits, for purpose of said Motion, all facts well pleaded by plaintiff in his Complaint, as amended; and also admits, in light of defendant's failure to file any affidavit or counter-affidavit in connection with its Motion, all facts averred in plaintiff's affidavits in opposition to defendant's Motion.

Those particular facts are detailed below. Appendix references are to plaintiff's Appendix filed in the Court of Appeals.

A. Plaintiff's Status As An Independent Distributor:

Plaintiff's underlying contractual agreement as a distributor of the defendant is set forth in two Agreements, dated respectively September 23, 1961 and December 30, 1963, between the plaintiff and defendant herein; both of which Agreements were drafted and prepared by the defendant (App. 6-9, 201-203).

Plaintiff was a so-called "exclusive" distributor of the defendant. His "exclusivity" related only to the fact that as an exclusive distributor he was contractually obligated to sell the defendant's products *only,* and was contractually barred and restricted from selling or offering for sale any other baked products manufactured by other bakery firms, whether competitive or not to the Stella D'Oro product line. Said distributorship agreements did *not* give or purport to give the plaintiff any exclusive right to sell defendant's products in the territory designated and alloted by the defendant to the plaintiff. (App. 82, 207).

In relationship to the defendant manufacturer, Stella D'Oro Biscuit Co., Inc., plaintiff was an independent contractor and vendee customer of the products purchased by him from the defendant; and not an agent or employee of the defendant. Among other things, the plaintiff distributor (i) bought the products sold to him by the defendant, and took title thereto, (ii) was billed by the defendant for the products so sold to him, and was responsible for the payment of the purchase price therefor, (iii) absorbed any credit loses sustained by reasons of non-payment by the retailer, whether or not said retailer was centrally billed by the defendant, and (iv) absorbed so-called spoilage resulting from "breakage" and/or "stale returns." (App. 4-5, 83, 207-208)

Plaintiff sold and delivered said products to individual retail stores in his territory, whether a chain store or an independent store, through driver route salesmen who were employed by the plaintiff on a commission basis. In addition, plaintiff sold said products directly to institutional jobbers and wholesale grocers in the metropolitan area of Chicago, who in turn sold said products to institutional accounts. The defendant manufacturer was

likewise concurrently selling its products direct to institutional jobbers and wholesale grocers in the same geographic area, in competition with the plaintiff. (App. 5, 10-11, 83, 176-177).

B. Defendant's "Price Fixing" Of The Wholesale Resale Prices At Which Plaintiff Could Sell Stella D'Oro Products:

During the entire period of plaintiff's distributorship, the defendant published, distributed, made available and furnished to its distributors (including plaintiff) and to retailers purchasing its products, written or printed Price Lists, prepared by the defendant, setting forth and "fixing" (1) the wholesale resale prices at which its distributors, including plaintiff, could sell Stella D'Oro products, and (2) the retail resale prices at which retailers could sell defendant's products. Said Price Lists are broken down into different "geographic price zones" arbitrarily and artificially fixed as follows (App. 18-19, 85-86, 209-210, 387-389, 109, 148):

Zone 1: Applies to the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania (East of Altoona), Delaware, Virginia (East of Richmond) and Maryland.

Zone 2 (formerly Zone 1A): Applies to the States of Pennsylvania (West of Altoona), Virginia (West of Richmond), West Virginia, Ohio, Michigan, Kentucky, Indiana, Illinois and Wisconsin (South of Oshkosh).

Zone 3: Applies to the States of Wisconsin (North of Oshkosh), North Carolina, South Carolina, Tennessee, Georgia, Florida, Alabama, Mississippi, Iowa, Minnesota, North Dakota, South Dakota, Louisiana, Arkansas, Missouri, Oklahoma, Texas (East of but includ-

ing Ft. Worth & Houston), Nebraska and Kansas.

Metropolitan Zone: Applies to the Metropolitan Area of New York City, New York, including all the boroughs thereof, and adjacent areas, and parts of New Jersey and Connecticut.

Zone 6: Applies to area outside continental U.S.A. including Canada and Puerto Rico.

Zone 7: Applies to the States of Montana, Wyoming, Colorado, New Mexico, Utah, Idaho, Arizona, Nevada, California, Washington, Oregon and Texas (west of Ft. Worth and Houston).

Said "geographic price zones" are unrelated to either natural geographic barriers or to economically homogenous marketing areas, at witness the fact that such disparate marketing areas as St. Louis, Missouri, Tampa, Florida, Houston, Texas, and Wisconsin (north of Oshkosh) are all in Zone 3, which Chicago, Illinois, Pittsburgh, Pennsylvania, Detroit, Michigan, and Cleveland, Ohio are all in Zone 2.

Defendant's "fixing" of the wholesale resale prices at which plaintiff, and other distributors of the defendant, could sell defendant's products to retailers is reflected (1) by the contractual distributorship agreements between the plaintiff and defendant (App. 6-12); (ii) in the written or printed price lists published and distributed by the defendant to its distributors and retailers (App. 213-215); (iii) by the contract authorization or blanket order agreements solicited and received by the defendant from various major chain store accounts (App. 215-216, 409-414); the fact that the trade discounts at which defendant's distributors, including plaintiff, purchased defendant's products were fixed and determined

by defendant with reference to the wholesale resale prices fixed by the defendant (App. 6, 10, 48, 57); and (v) the fact that the chain store discount or rebate (generally 5%) granted and paid by defendant to favored "centrally billed" chain store accounts was fixed by the defendant in relationship to the wholesale resale prices fixed by the defendant. Said published wholesale prices fixed by the defendant are predicated on a freight prepaid basis, that is, freight and transportation charges in connection with defendant's shipping said merchandise to its distributors or retailers are prepaid by the defendant and are built into the stated wholesale prices on a price zone basis, and are not separately stated or charged to defendant's distributors or retailers. (App. 212-213)

C. Defendant's Practice Of Allowing & Paying Discriminatory Discounts To Certain Favored Chain Store Accounts "Centrally Billed" By Defendant, In Connection With The Sale By Plaintiff Of Stella D'Oro Products To Such Chain Stores, And Charging Same Back Against Plaintiff's Account So As To Compel Plaintiff To Absorb Said Discounts:

Plaintiff avers that during the entire course of plaintiff's distributorship, that the defendant mandated, granted and was responsible for authorizing, allowing, granting and paying to the major chain store accounts centrally billed by the defendant to whom plaintiff sold defendant's products, but not to all centrally billed chain store accounts, a discriminatory chain store discount or rebate (usually 5%); and that defendant has since January 1, 1964 charged back against plaintiff's account with the defendant the chain store discounts or rebates granted and paid by the defendant to said major chain store accounts, thus in effect compelling the plaintiff to absorb

the cost of such discriminatory discounts or rebates. (App. 17-18, 178-179).

The undisputed dollar amounts of discriminatory chain store discounts granted, allowed and paid by the defendant to chain store accounts centrally billed by the defendant, and charged back to the plaintiff by the defendant, on sales of Stella D'Oro products made by the plaintiff to such chain stores from and since March 22, 1968 to and including January 3, 1972 (when Plaintiff's distributorship was terminated) are as follows (App. 243, 249):

Time Period	Amount
3/22/68 - 12/31/68	$29,525.48
1/ 1/69 - 12/31/69	37,640.09
1/ 1/70 - 12/31/70	33,544.95
1/ 1/71- 1/ 3/72	35,176.29
TOTAL	$135,886.81

The chain store discount (normally 5%) received by some, but not all, centrally billed chain store accounts, bore no functional relationship whatsoever to the manner in which the individual chain stores were serviced by the plaintiff, inasmuch as distribution of the defendant's products to the individual retail stores was made in the same manner whether said retail store was an independent, a chain store receiving the chain store discount, or a chain store not receiving the chain store discounts; *i.e.*, by sale and delivery, by the plaintiff distributor from his warehouse, through his driver route salesman, directly to the individual retail stores. Nor did the defendant incur any distribution or delivery costs in connection with the plaintiff's sale and delivery of Stella D'Oro products to the individual retail stores to whom plaintiff sold said products. While chain store discounts were thus given by the defendant to certain chain store

accounts centrally billed by the defendant in connection with plaintiff's sales to said chain store accounts, hundreds of independent retail stores and some centrally billed chain store accounts, doing business in the same geographic areas as chain store accounts that received such chain store discounts, received no chain store discount in connection with the Stella D'Oro products sold to them by the plaintiff. (App. 15-16, 260, 232-233).

The "fixed" wholesale prices in the case of products sold to those favored "centrally billed" chain stores who received the 5% discriminatory chain store discounts or rebates, *included as a fixed and integral component thereof* the 5% discount granted by the defendant to said chain stores, and charged back by the defendant to the plaintiff.

The strong adverse economic competitive impact on plaintiff of such centrally billed chain store discounts being charged back by the defendant against the plaintiff, thus causing the plaintiff to absorb the same, is reflected by the fact that the plaintiff on centrally billed sales totaling $2,955,634.77 for the period 1968 through 1971, on which chain store discounts were granted by the defendant, derived a total net profit of *exactly $1,278.51* (or 4.3/100ths of 1%) for the four year period (App. 243, 422-426)!

Plaintiff avers that defendant was the moving and dominating force in introducing, maintaining, effectuating, and foisting on the plaintiff, defendant's policy and practice of granting discriminatory chain store discounts to certain centrally billed chain store accounts, and charging same back to the plaintiff; and in imposing on the plaintiff the "central billing" system of the defendant by which the defendant effectuated its payment and

granting of said discriminatory chain store discount to favored chain store accounts, and the charge back thereof against the plaintiff. (App. 235-236, 239-241). Plaintiff avers the following uncontroverted facts as evidence thereof:

(a) The Memo of A. J. Santero (general manager since 1959, and Treasurer and a Director since 1952 of the defendant corporation) to the plaintiff, dated Jan. 13, 1960, at the time that plaintiff was employed by the defendant as a Midwest sales representative (which was prior to plaintiff becoming a distributor of the defendant on Sept. 23, 1961), in which, among other things, the defendant (through said A. J. Santero) stated defendant's practices and policies as follows (App. 227-228, 395-403):

"As you know Ed, we give our chain accounts a 5% discount. This policy holds true in the Chicago distributing area. However, in all of our other cases, or areas of distribution, the company aborbs the full amount of chain discount. Because of the 25% initial discount Dom (Pupello, the then distributor of defendant in the Chicago distributing area) receives, he absorbs 3% of the 5%. In other words, on chain discounts, the company absorbs 2%, and he absorbs 3%. Of course, in effect, the drivers absorb it because the drivers serve the accounts."

* * *

"Let's remember too that anything of any consequence, especially with distributors, must come from this office."

* * *

"A few more things to remember. This office is the only power, or has the only power, to authorize charge accounts, or discounts. Naturally, if any of our distributors pick up a new chain account, we don't object to opening up a charge for them, but we maintain the sole right to establish a charge account because too often a distrubutor will get a request from an individual storeowner to become a charge, and unless we were the only ones to authorize it, they would be turning in all kinds of charges. I mentioned too that discounts can only be authorized by this office. Well, this means regardless of who intends to absorb it. . . . Let me emphasize again that when it comes to establishing a charge account, or authorizing a discount, only this office can do so."

"Reports: All distributors, that is exclusive distributors, and in your case it means only one for the time being, Dom Pupello, is required to submit to us a weekly sales report. We happen to call this report, Agents Daily Progress Report. Attached is a copy of same, in blank, of course. These reports are submitted to us weekly, along with the agents, or distributors' charges, payments and correspondence that we receive at this office each week from him."

(b) During the term of plaintiff's distributorship, the defendant pursued basically the same central billing and chain store discount policies and practices with its other exclusive distributors throughout the country as it did with plaintiff in that it centrally billed chain store accounts of its other distributors, and granted, allowed or paid, to some, but not to all, of such centrally billed chain store accounts, chain store discounts ranging from 1% to 10% (but usually 5%); while at the same time no such equivalent discount was granted or paid to independent or non-chain store accounts doing business in the same geographic areas as the chain store account that received such chain store discount. Such chain store discounts so paid or allowed to centrally billed chain stores were likewise charged back by the defendant to the applicable distributor of the defendant,

so as to cause said distributor to absorb the same. (App. 233-234)

(c) The fact that the defendant did during the entire course of plaintiff's distributorship, and even prior thereto, give, grant and pay chain store discounts varying from 1% to 7% (but usually 5%) directly to retail chain store accounts to whom it sold *directly* in the metropolitan area of New York City. At the same time, the defendant was not giving, granting or paying discounts, equivalent to that given to chain stores, to independents and/or non-chain store retail stores to whom it sold Stella D'Oro products in the New York metropolitan area. (App. 232, 415-417, 120-140)

(d) The following major chain store accounts in the Chicago metropolitan area were being centrally billed by defendant, and were receiving or were allowed a chain store discount by the defendant in connection therewith, even prior to the commencement of plaintiff's distributorship (on 9/23/61) and even prior to the time the plaintiff became a sales representative or supervisor of defendant (viz. 1/13/60) (App. 232-233)

> A & P (The Great Atlantic & Pacific Tea Co.), Dominicks, Garden City, Goldblatts, Guido, Jewel Tea, Kroger, Lucky (Eagle), Muskal (absorbed by Wieboldt in 1967), National Tea, Pick 'N Save, Piggly Wiggly, Ship Bros., Sure Save.

In addition, subsequent to the plaintiff becoming a distributor of the defendant, the defendant allowed and paid, and charged back against the plaintiff's account, the chain store discounts or rebates allowed by the defendant to certain "centrally billed" national chain store accounts (*e.g.*, Allied K-Mart, Kresge and Woolworth) to whom plaintiff sold Stella D'Oro

products in the Chicago metropolitan area. (App. 263-264).

(d) The direct authorization agreements entered into between the defendant and certain major chain store retailers specifying and fixing, in accordance with defendant's applicable price list, the wholesale prices at which defendant's products would be sold to such retailers, whether sold through defendant's distributors or directly by the defendant, and the retail prices at which defendant's products would be sold by such retailers to the consumer (App. 215-216, 409-414), and the chain store discount granted to such chain store account.

(e) The fact that the defendant was and continued to be the only and final authority for the granting of central billing charge account status to a chain store account (usually consisting of three or more stores) qualifying credit-wise for said status, and for the granting of a chain store discount, if any, to such an account in connection with the central billing of said account by the defendant, is further evidenced by the so-called "charge authorization" forms prepared by defendant) which the defendant required its distributors (including plaintiff) and its supervisors in the New York metropolitan area (where the defendant sold directly to the retail stores) to fill in and send to the defendant's home office in the Bronx, New York City, for approval by the defendant. Said charge account authorization form basically indicated the name and address of the chain store to be centrally billed by the defendant as a charge account, and the applicable chain store discount, if any, that said account was to receive in connection with said account's purchase of Stella D'Oro products. It was defendant's practice and policy to review said charge authorization forms

sent into it by its distributors (including plaintiff), and by its superviors in the New York metropolitan area, and to indicate on said form the approval of the defendant (usually in the form of an "OK" signed or initialed by, or the signature or initials of Joseph Verde (JV), Al Santero (AJS), Jim Davidson (JD) or Marcella or E. V. Cerutti of the defendant firm) of (i) central billing charge account status for the particular account, and (ii) of the designated chain store discount, if any, that said account was to receive in connection with said chain store account's purchase of Stella D'Oro products. (App. 229-230, 407).

D. Defendant's "Central Billing System" For Chain Store Accounts - It's Operation And Role:

The vehicle and channel through and by which these discriminatory chain store discounts or rebates were funneled to the favored chain stores receiving the same, was the "central billing" system instituted, maintained and mandated by the defendant under which chain store accounts, having 3 or more stores and of good credit standing, to whom its distributors (including plaintiff) sold defendant's products, were centrally billed by the defendant, rather than having said chain store accounts billed directly by the individual distributors of the defendant. Under this "central billing system", copies of sales slips or invoices of merchandise sold and delivered to individual retail stores were required to be transmitted by the distributor and his driver route salesmen to the defendant at its office in New York, New York, and the defendant would then directly bill, at the retailer's wholesale prices fixed by the defendant, on its own statements, the various chain store accounts which were so centrally

billed, for the merchandise sold by the distributor to said chain store accounts. Under defendant's central billing system, the chain store accounts so centrally billed by the defendant remitted their payments for the merchandise purchased by them directly to the defendant, rather than to the individual distributor, and deducted the chain store discount (generally 5%) granted by defendant to such chain store account (generally pursuant to direct authorization agreements entered into between the defendant and the chain store account setting forth the chain store discount granted to such chain store account). In some cases, the chain store account receiving a chain store discount, received it directly from the defendant in the form of a refund check, rather than by way of a credit. The defendant would credit the plaintiff distributor's account for the payments received from the chain store, and then charge back the chain store discounts or rebates, granted and given to the various centrally billed chain store accounts, to the plaintiff distributor; thus in effect passing on the cost of said discount to the plaintiff distributor. Notwithstanding said defendant's central billing system, any credit losses sustained by reason of nonpayment of such centrally billed chain store accounts were charged by the defendant against plaintiff's account with the defendant. (App. 210-212, 239-240).

Plaintiff avers that defendant's "central billing system" was the key lynchpin to the "controlled" pricing system of the defendant, and that said central billing system enabled the defendant (i) not only to control and monitor the prices (fixed by the defendant) at which its products were sold at the wholesale level to chain store retailers by the plaintiff, and its other distributors, but

in addition (ii) enabled the defendant to control and monitor the retail prices (fixed by the defendant) at which its products were sold to the consumer public, (iii) to monitor the territorial and product restraint imposed by the defendant on the plaintiff (and its other distributors), (iv) to control and provide a "conduit" for the payment of the discriminatory 5% chain store discounts which it granted and paid to certain favored chain store accounts, and (v) to control and utilize, and thereby deprive the plaintiff distributor of, the "cash flow" receivable remittances (averaging over $773,000.00 per year in the case of the plaintiff alone for the calendar years 1967 through 1971) generated by plaintiff's sales to centrally billed chain store accounts. (210-212).

E. The Price Discrimination To Which Plaintiff Was Subjected To By Defendant In Connection With Plaintiff's "Purchase" Of Defendant's Products, And The Anti-Competitive Impact Thereof:

From January 1, 1964 to and including January 3, 1972, the defendant sold its products to the plaintiff at a trade discount of 26% (off its fixed wholesale prices) compared to the higher trade discount of 29% (off its fixed wholesale prices) at which defendant sold its products, of like grade and quality, to certain other favored distributors of the defendant, viz. to defendant's exclusive distributors in the Detroit, Michigan, Cleveland, Ohio and Pittsburgh, Pennsylvania areas located in the same geographic price zone as the plaintiff. By reason thereof plaintiff paid 3% more for the merchandise that he purchased from the defendant, than did such other favored distributors of the defendant who thereby paid 3% less, compared to the plaintiff, for the merchandise (of like grade and quality) that they purchased from the defendant. (App. 252-254, 107-113, 146-147).

Plaintiff avers that said price differential was not due to any legitimate transportation or other distribution cost differential upon the part of the defendant in relationship to the sales made by it to said favored distributors, as compared to the sales made by it to the plaintiff. Specifically, plaintiff avers that the price differential was not due to any differences in transportation or freight costs, since such costs were already built in and included in defendant's fixed wholesale prices inasmuch as the defendant sold its products on a "freight prepaid" Price Zone basis, with its freight and transportation costs on a zone basis (rather than on an individual distributor basis) already built in and incorporated in the fixed wholesale prices set forth in defendant's published Zone Price Lists. (App. 252-254, 107-113, 146-147).

The record is uncontroverted that the plaintiff during the period between 1965 and 1967 was selling and distributing to retail stores in the Benton Harbor-St. Joseph, Michigan area, through his driver route salesmen (J. Kwasnieski and Ed's Cheese Enterprise, Stella D'Oro products in the Benton Harbor-St. Joseph, Michigan area, and was competing during said time period with the Detroit, Michigan distributor (S & M Distributing Co. — Sol Steinbruck) in selling Stella D'Oro products, of like grade and quality, to retail stores in said Benton Harbor-St. Joseph, Michigan area. Among the retail stores to whom plaintiff so sold and distributed said Stella D'Oro products were an A & P store in Ben-

ton Harbor, a Hilltop Food store in Benton Harbor, a Hilltop Food store in St. Joseph, Michigan, a Kroger store in Benton Harbor, a Thrifty Market store in Benton Harbor, and an IGA store either in Benton Harbor or a suburb thereof. The total sales made by plaintiff, through his driver route salesmen, to retail stores in the Benton Harbor-St. Joseph, Michigan area, during the time that plaintiff was selling Stella D'Oro products in the Benton Harbor-St. Joseph, Michigan area, were between $100 to $150 per week. In 1967, the defendant acting through Joseph Verde, its sales manager, because of alleged complaints by the Detroit distributor that the plaintiff was competing with the Detroit distributor in the Benton Harbor-St. Joseph area, barred and prohibited the plaintiff from selling Stella D'Oro products in said Benton Harbor-St. Joseph area. (App. 262-263).

It is to be noted that the territory alloted to the plaintiff by the defendant, as set forth in their Agreement dated September 23, 1961, included the southwestern tip of the State of Michigan (running on a "straight line northwest" from Goshen, Indiana to St. Joseph, Michigan), and that the plaintiff, through his driver route salesmen, distributed and sold Stella D'Oro products to retailers in the Benton Harbor-St. Joseph area and environs, including such towns as Benton Harbor, St. Joseph, Buchanan, Niles and Dowagiac, Michigan. The record indicates that the Benton Harbor-St. Joseph, Michigan area was not a part of the territory originally assigned by the defendant to said Detroit, Michigan distributor; the territorial boundaries of the Detroit distributor being delineated as "beginning from Detroit, up to Port Huron, over to Bay City, over to Muskegon,

down to Kalamazoo, east to Toledo back to Detroit again." (App. 262-263).

In this connection, plaintiff avers that the defendant imposed, and enforced, territorial restraints on the plaintiff which barred and prevented the plaintiff from selling Stella D'Oro products outside the territory alloted to the plaintiff by the defendant, and thereby prevented and barred the plaintiff from competing with other exclusive distributors of the defendant, located in the same geographic price zone as the plaintiff, in the sale of Stella D'Oro products; including defendant's distributors in Detroit, Michigan, Cleveland, Ohio and Pittsburgh, Pa., all of whom were buying defendant's products at a 29% trade discount compared to the 26% trade discount which the defendant allowed the plaintiff. The fifth paragraph of the original Agreement of September 23, 1961, between plaintiff and defendant, not only delineates the "territory" in which the plaintiff could sell the products which plaintiff purchased from the defendant, but, in addition, specifically provides that plaintiff "will not sell or offer for sale such products outside the limits of such area." While this language is ostensibly omitted from the Agreement of Dec. 30, 1963, the plaintiff avers that defendant in practice and in fact continued to impose such territorial restraint upon the plaintiff by limiting the areas in which plaintiff could sell the products which the plaintiff purchased from the defendant; and that specifically, during the term of plaintiff's distributorship, the defendant prohibited and barred the plaintiff from selling said products in the Benton Harbor-St. Joseph, Michigan area, the Milwaukee, Wisconsin area, the Davenport, Iowa area, the Rockford, Illinois area, and

the South Bend-Ft. Wayne, Indiana area (App. 222, 420, 421).

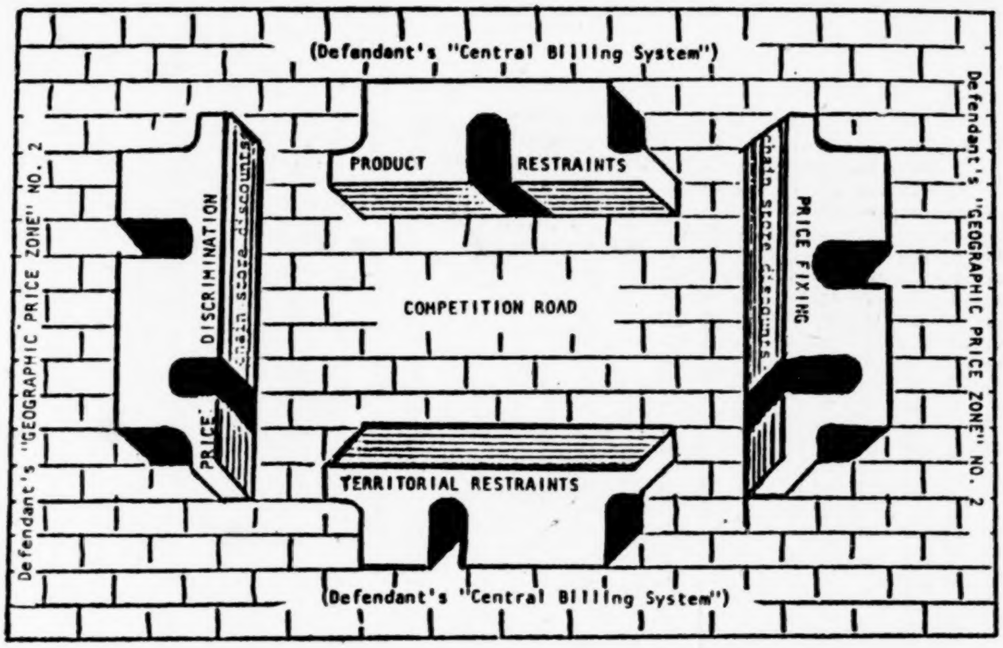
Plaintiff avers that said 3% price discrimination to which he was subjected to by the defendant on the "buying" end, taken in conjunction with and within the framework of (i) defendant's admitted practices of "fixing" defendant's resale prices at the "selling" end; (ii) foisting on plaintiff the discriminatory 5% chain store discount or rebate which defendant granted and paid to certain favored centrally billed chain store accounts; (iii) imposing "product restraints" on the plaintiff which barred the plaintiff from selling or offering for sale "any baked products manufactured by any other persons, firm or corporation", whether or not competitive with the products manufactured by the defendant; and (iv) imposing "territorial restraints" on the plaintiff which barred him, a supposedly independent distributor, from competing with other independent distributors of the defendant in the sale of Stella D'Oro or other products,—tended to and did in fact substantially lessen competition in that the plaintiff, with his selling prices, product lines and sales territory restricted, boxed-in or frozen-in by the operation of said restraints, found himself paying 3% more for defendant's products than other favored distributors of the defendant in the same geographic price zone. This additional "cost of goods" burden (totaling $260,127.75 from 1/1/64 to 1/3/72, or $131,-528.90 for the 4 years period from 3/22/68 to 1/3/72), —given the constraints which prevented the plaintiff from adjusting or increasing his selling prices, or expanding his products line, or his sales territory,—adversely affected plaintiff's earnings, his ability to meet

increased costs of doing business, and his ability to compete and engage in business as a distributor of the defendant, and led to the termination and loss of plaintiff's distributorship. (App. 255-256, 113).

Thus, for the four (4) years period from 1/1/68 to 1/3/72 on total sales of $4,683,960.35, the plaintiff made a total net profit of $77,585.15 (or an average of $19,396.29 per year); or an average annual net profit margin during that period of 1.655%. For the same 4 years period, the plaintiff paid a 3% discriminatory price differential totaling $140,518.80 (3% of $4,683,960.35). This despite the uncontroverted fact that plaintiff, during this same 4 years period, and even prior thereto, was the largest distributor of the defendant in the country in terms of dollar volume of purchases of defendant's products.

The anti-competitive impact and consequences, as they relate to the plaintiff, resulting from the price discrimination, price fixing, products and territorial restraints imposed by the defendant on the plaintiff, are graphically set forth hereafter.

THE ANTI COMPETITIVE IMPACT AND CONSEQUENCES RESULTING FROM THE PRICE DISCRIMINATION, PRICE FIXING, PRODUCTS AND TERRITORIAL RESTRAINTS IMPOSED BY DEFENDANT ON PLAINTIFF, GRAPHICALLY SET FORTH.



I. Price Discrimination (as reflected by 3% higher price differential paid by plaintiff for defendant's products, as compared to prices paid by other favored distributors of defendant in Detroit, Cleveland and Pittsburgh, located in the same "geographic price zone" as the plaintiff), resulting in:

(1) Increase in Plaintiff's "Cost of Goods" amounting to $260,127.75 for the period from 1/1/64 to 1/3/72 on purchases of $8,670,825.00; or $140,518.30 for the 4 year period from 1/1/68 to 1/3/72 on purchases of $4,683,960.35

(2) Lower profit margin: For the 4 year period from 1/1/68 to 1/3/72, the plaintiff made a total net profit of $77,585.15 for an average of $19,396.29 per year); or an annual net profit margin during that time of 1.655%.

V. As It Relates To The "Product Restraints" Imposed On Plaintiff by the Defendant (Counts II & IV), of:

(a) Barring the plaintiff from selling or offering for sale "any baked products manufactured by any other person, firm or corporation", whether competitive or not with the products of the defendant, during the term of plaintiff's distributorship, and for one (1) year thereafter within a radius of 100 miles from plaintiff's place of business;

(b) Barring the plaintiff from purchasing and selling the bakery products of two other bakery manufacturers (viz. "Pizelle" wafers from Caroline Baking Co. and "Lady Finger" sponge cakes from Specialty Lady Fingers, unless purchased through defendant, rather than directly from such other bakery manufacturers; resulting in:

II. Price Fixing & Price Discrimination (as it relates to defendant charging back against the plaintiff, thereby compelling plaintiff to absorb same, the discriminatory chain store discount, generally 5%, granted by defendant to certain "centrally billed" chain store accounts to whom plaintiff sold defendant's products), resulting in:

(1) Increase in Plaintiff's "Cost of Sales" in the amount of $135,886.81, for 4 year period from 3/22/68 to 3/22/72.

(2) Reduction in Plaintiff's "profit margin" on such "centrally billed" chain store sale to virtually "zero." Note: On centrally billed sales of $2,955,634.77 on which chain store discounts were allowed by the defendant (for 4 year period from 1968 through 1971), the plaintiff derived a total net profit of exactly $1,278.51 (or 4.3/100ths of 1%), and in some years (1969 & 1970) lost money.

III. Defendant's "Central Billing System", Its Operation: The imposition of defendant on plaintiff of defendant's "central billing system" provided a "conduit" for the payment by defendant of the discriminatory chain store discounts granted by it to certain favored chain stores, enabled defendant to control and "monitor" the "fixed" wholesale and retail prices at which its products were sold, to monitor the territorial and product restraints imposed by the defendant, and deprived the plaintiff distributor of the use of the "cash flow" receivables (averaging over $773,000.00 per year during the period 1967-1971) generated by plaintiff's sales to centrally billed chain store accounts.

IV. As It Relates To Defendant's "Price Fixing" Practices of:

(a) Fixing the wholesale resale prices (including the discriminatory chain store discount portion thereof) at which plaintiff could sell Stella D'Oro products to retailers;

(b) Fixing and attempting to fix the retail prices at which retailers could sell Stella D'Oro products at retail;

(c) Fixing the wholesale and retail resale prices of Stella D'Oro products within the framework of "geographic price zones" fixed by the defendant; resulting in:

All the anti-competitive consequences normally associated with "price fixing" in depriving plaintiff distributor of the right and freedom to resell the merchandise, which he purchased from defendant, at his own resale prices on the market place.

(1) Plaintiff being denied free access to the market place for products manufactured by other bakery manufacturers, other than the defendant.

(2) Denying and foreclosing to such other manufacturers the right and opportunity to sell their products directly to the plaintiff.

(3) The plaintiff being able to purchase said Lady Finger and Pizelle bakery products only through the defendant, or not at all, and at prices 14.3% to 16.75% higher than plaintiff would have been able to purchase said products directly from the manufacturer thereof, but for said restraints.

VI. As It Relates To The "Territorial Restraints" Imposed On Plaintiff By The Defendant (Count IV):

Barred plaintiff and other distributors (including the Detroit area distributor with whom plaintiff had competed for a period of time) of the defendant from "competing" with one another, thus in effect operating to insulate and immunize defendant's price discrimination and price fixing practices.

VII. Overall Anti-Competitive Consequences On Plaintiff:

"Froze" and restricted plaintiff's ability to meet or offset the increased operating costs resulting from increased "Costs of Goods" (because of defendant's price discrimination), increased "Costs of Sale" (because of chain store discounts charged back by the defendant against the plaintiff), and other increased operating expenses, including the demands of the driver-salesmen for more compensation, given the price fixing, price discrimination, and territorial and product restraints within which defendant circumscribed plaintiff's business operations, so that plaintiff could not increase the selling prices of his goods, or expand his territorial market, or take on additional non-competitive product lines to offset such costs. Net result: Termination of plaintiff's distributorship by the defendant.

F. The "Products" Restraints Imposed On Plaintiff By Defendant:

Under the fifth and fourteenth paragraphs of the distributorship Agreement between the plaintiff and defendant, dated Dec. 30, 1973, plaintiff was specifically barred from selling or offering for sale "any baked products manufactured by any other persons, firm or corporation", whether or not competitive with the products of the defendant, during the term of plaintiff's distributorship (App. 47-55, 55-61).

Plaintiff avers that as a consequence of said product restraint the plaintiff was barred by the defendant, during the more than 10 years of plaintiff's distributorship, from selling or offering to sell non-competitive bakery products of other bakery manufacturers; and that as a direct consequence thereof that the plaintiff sustained loss or damages in the amount of at least $35,000.00 by reason of the loss of profits that he reasonably could have made had he been permitted by the defendant to sell or offer to sell certain other non-competitive bakery products offered to him for sale by other bakery manufacturers (App. 151). This is the gist of Count IV of plaintiff's Complaint, as amended. (App. 219-220).

Plaintiff further avers that as a direct consequence of said product restraint the plaintiff, in order to buy and sell two specific non-competitive bakery products of other bakery manufacturers (viz. "Pizelle" wafers from Caroline Baking Co. and "Lady Finger" sponge cakes from Specialty Lady Fingers Co.), was required by the defendant to purchase said other bakery products *only through the defendant,* rather than directly from such other bakery manufacturers, and at prices 14.3% to 16.75% higher

than plaintiff would have been able to purchase said products directly from the manufacturer thereof, but for said restraints (App. 27-32, 257-260, 110-111, 428). This is the gist of Count II of plaintiff's Complaint, as amended; for which plaintiff claims damages in the amount of $16,933.84, representing the higher price differential which the plaintiff was compelled to pay for said products by reason of having to purchase same only through the defendant, rather than directly from such other manufacturers (App. 257, 258).

In this connection plaintiff avers and specifically points out that the letter agreement (dated July 12, 1962) between the defendant and the Caroline Baking Co., Inc. (manufacturer of the "Pizelle" wafers), applicable to defendant's distributors in 11 states (Conneticut, Rhode Island, Massachusetts, Maine, New York, New Jersey, Pennsylvania, Maryland, Ohio, Michigan and Illinois) and the District of Columbia, relating to the sale of said pizelle wafers by the Caroline Baking Co. to defendant's distributors, specifically provided that the Caroline Baking Co., upon written notice from the defendant, would not accept orders from any of the defendant's distributors listed in said notice. (App. 427-429).

Plaintiff avers that said "product" restraints served no valid or redeeming distributive function, and that its function and purpose was pure and simply to restrain trade and competition (1) by barring the plaintiff from selling or offering for sale "any" baked products of *any* other bakery manufacturer, whether or not such other baked products were or were not competitive with those manufactured by the defendant, and (2) by denying and foreclosing to any and all other bakery manufacturers,

whether or not their products were or were not competitive with those of the defendant, access to the plaintiff as a customer and market for their products.

G. Plaintiff's Distributorship Terminable By Defendant On 15 Days Notice - Its Effect:

Plaintiff avers that plaintiff's acquiescence, or participation, if any, in the aforesaid restraints and practices by the defendant was due to the economic dominance and control that the defendant at all times exercised over the plaintiff so that the plaintiff had reasonable grounds to believe and fear that his refusal or failure to comply with said restraints and practices imposed by the defendant would or could result, particularly in view of the fifteen (15) days termination provision contained in his Distributorship Agreement with defendant, in a termination by the defendant of his distributorship; and the fact that such termination of plaintiff's distributorship by the defendant did in fact take place by the defendant in June of 1969, but was then rescinded by the defendant. (App. 226-242).

II. The Reasons Why Writ of Certiorari Should Be Granted:

Petitioner respectfully submits that the Court of Appeals and the District Court both have misconstrued and misapplied the law properly applicable to this case both as to (1) the threshold issue of plaintiff's standing to sue and maintain the within action against the defendant under Section 4 of the Clayton Act, and (2) as to the equally important substantive issues as to whether or not plaintiff, as a matter of law, has made out a cause or causes of action against the defendant cognizable under the Federal Antitrust Laws.

It is respectfully submitted that the decisions of the lower courts in this cause, if permitted to stand, would emasculate and make a mockery of the remedial purpose and public policy considerations of Section 4 of the Clayton Act. This was not the intent of this Honorable Court's decisions in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977) and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977); to which decisions the Court of Appeals would appear to have over-reacted in the instant cause.

A. The Section 2(a) Violation - Count I:

In relationship to the Section 2(a) violation charged by Count I of plaintiff's Complaint, as amended, the District Court held that the plaintiff has no standing under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) to sue and maintain an action against the defendant under Section 2(a) of the Act, and granted summary judgment in favor of the defendant in relationship thereto.

The rationale of the District Court was that only an aggrieved retailer, and not the plaintiff, has standing to challenge the discriminatory chain store discounts or rebates granted by the defendant to certain centrally billed chain store accounts, and charged back against plaintiff by the defendant. This on the supposition that the "breakdown of competitive conditions" occurs not in plaintiff's wholesale market but rather at the retail level. The District Court Judge then proceeded to say that "even if plaintiff could be considered within the 'target area' of the section 2(a) violation charged in Count I", that the plaintiff had suffered no injury from the alleged price discrimination between the favored chain stores and the independent retailers, and argued that the plaintiff, to prove that he has suffered injury from the 5% chain store discount, would have to show that the chain stores would have pur-

chased Stella D'Oro products from him without the granting of the 5% chain store discount or rebate.

The Court of Appeals affirmed, saying:

> "It would not do plaintiff any good to persuade us to select, as Judge Flaum did, among the various section 4 standing and injury doctrines. It is clear plaintiff could not prevail under any of them. The independent retailers, who did not enjoy the 5 percent rebate, solely occupied the 'target area' and plaintiff improperly sues as surrogate for them. As regards 'antitrust injury,' plaintiff does not pass the *Brunswick* test. The defendant's anticompetitive action, the 5 percent rebate to chain stores, would have been equally anticompetitive if plaintiff had not been required to absorb it. That he was so required is, therefore, not an 'antitrust injury' but one reflecting harsh treatment of a distributor by a manufacturer. If defendant had absorbed the rebate, there would have been no injury, yet the anticompetitive nature of its policy would not have been affected one iota. So it is not an 'antitrust injury.' Judge Flaum found that plaintiff was unable to raise an issue of fact that it could have sold to the chains without the rebate. This serves to distinguish *Greene* v. *General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976), otherwise quite like this case on its facts, and heavily relied on by plaintiff here." (App. 8a)

The basic fallacy and error upon the part of the Court of Appeals and the District Court in the instant cause, as it relates to the issue of plaintiff's standing to sue under Section 4 of the Clayton Act, lies in the failure of the lower courts herein to recognize: (1) that the "target area" herein is two tiered in nature, and that it was not the independent retailers who "solely" occupied the target area, but the plaintiff distributor as well; and (2) that plaintiff's "injury" and measure of damages are *not* duplicative of and are completely independent of any cause of action for damages that the independent retailers might have against the defendant, and are *directly* related to and an outgrowth of acts and conduct upon the part of the defendant that violate the Federal Antitrust Laws.

In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 489 (1977) this Court pointed out that "the antitrust laws . . . were enacted for the protection of competition", and defined an "antitrust injury" as "injury" of the type that the antitrust laws were intended to prevent and *that flows from that which makes defendants' acts unlawful.* The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

In *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), this Court, at least inferentially, impressed its imprimatur upon the "target area" approach to the effect that a plaintiff has standing under Section 4 of the Clayton Act if the claimed losses fall "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."

There is no opening of the door here in the instant cause, in plaintiff's action, to duplicative recoveries, as was the concern of this Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 731 (1977), and *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). For what the plaintiff is here seeking to recover is the monies that *he himself was compelled to pay to the defendant manufacturer* by reason of the charge back by the defendant against plaintiff's account of the clearly discriminatory and illegal discounts or rebates which the defendant gave to certain favored chain store accounts centrally billed by the defendant to whom plaintiff, ostensibly an "independent distributor", had sold defendant's products (thus in effect compelling

the plaintiff to absorb said discriminatory and illegal discounts or rebates).

Plaintiff in this action is *not* acting, and does not purport to act, as "surrogate" of the independent retailers who did not enjoy the 5% discount or rebate. The measure of damages of any such independent retailers against the defendant would be the higher prices that such independent retailers were compelled to pay for defendant's products as compared to the lower prices at which defendant's products were sold to favored chain store accounts. Such damages are not duplicative whatsoever and are completely independent of the damages suffered by the plaintiff.

To take the position, as the lower courts herein did, that there is no breakdown in competitive conditions where, as here, the discriminatory chain store discounts or rebates paid by the defendant to favored chain stores are charged back against the plaintiff wholesale distributor by the defendant manufacturer, thereby compelling the plaintiff to absorb the same, and that the plaintiff has suffered no "injury" thereby, is to ignore reality. For there is a clear causal connection between the alleged price discrimination adversely affecting the plaintiff's competitive conditions, and plaintiff's injury. The breakdown in competitive conditions occurs not only at the retail level (where the independent retailer who receives no 5% chain store discount finds itself paying that much more for defendant's products), but at the wholesale level as well where the wholesale distributor is forced to absorb the cost of the discriminatory chain store discount granted by defendant. Whether the favored chain stores would have purchased Stella D'Oro products from the plaintiff without the discriminatory chain store discount granted by the defendant, is wholly irrelevant to the issue as to whether plaintiff has suffered injury by reason of defendant's conduct.

Defendant's practice of passing on to plaintiff the cost of the 5% discriminatory chain store discounts or rebates granted by defendant to favored chain store accounts, using the conduit of its mandatory central billing system as the vehicle for effectuating the same, interferes with and undermines and subverts, it is respectfully submitted, the normal marketing relationship and processes between an independent wholesale distributor and his retailers, and burdens and subjects the normal marketing processes with an inherently anti-competitive burden which clearly contributes to a "breakdown of competitive conditions."

The lower courts' conclusion that the plaintiff has suffered no injury to his business or property, by reason of the discriminatory chain store discounts given by the defendant to certain chain store retail accounts centrally billed by the defendant in connection with the sale and distribution of Stella D'Oro products by the plaintiff, and charged back by the defendant to the plaintiff, is wholly unwarranted and without foundation in fact. The fact is that defendant's conduct and action aforesaid cost the plaintiff $135,886.81 in unlawful and discriminatory discounts or rebates charged by the defendant to the plaintiff during the four years period immediately preceding the filing of the within lawsuit by the plaintiff.

The adverse economic impact on plaintiff of such centrally billed chain store discounts charged back by the defendant to the plaintiff is further reflected by the fact that as a result of said centrally billed chain store discounts charged back by the defendant against the plaintiff, that the plaintiff on centrally billed sales of $2,955,634.77 on which chain store discounts were allowed by the defendant (for the four years period 1968 to 1971 inclusive) derived a total net profit of *exactly $1,278.51* (or 4.3/100ths of 1%) for the four years period!

It is respectfully submitted that plaintiff is within the "target area" of defendant's illegal practices. The charge back by the defendant to the plaintiff of the discriminatory 5% chain store discounts or rebates granted by the defendant to certain chain store accounts centrally billed by the defendant, is directly related to defendant's granting of said discounts, and the use of defendant's central billing system as a conduit for the granting of said discriminatory chain store discounts or rebates.

Plaintiff was not "incidentally" injured by defendant's violation of the antitrust laws; he was not a "bystander" who was hit but not aimed at. To paraphrase *Mulvey* v. *Samuel Goldwyn Productions,* 433 F.2d 1073, 1076 (C.A. 9th, 1970), "he was neither sideswiped nor struck by a carom shot". He was directly and squarely "hit" and "aimed at" by defendant's discriminatory chain store discount practices, in that the defendant in granting said discounts, instead of absorbing the same itself, directly foisted the costs of said discriminatory discounts or rebates on the plaintiff; with the adverse economic consequences to the plaintiff noted above. The causal nexus between the discriminatory chain store discounts or rebates granted by the defendant, and the injury or loss sustained by the plaintiff is thus clear and direct.

For the plaintiff to have standing to sue and recover under Section 4 of the Clayton Act, there is no requirement in the law that the plaintiff be a competitor of the defendant. Nor is the cause of action dependent upon a relationship, contractual or otherwise, between the claimant and the offender, so long as the injury is a proximate result of the misdoing. See *South Carolina Council of Milk Producers, Inc.* v. *Newton,* 360 F.2d 414, 417-419 (C.A. 4th, 1966); *Hoopes* v. *Union Oil Company of California,* 374 F.2d 480, 485-486 (C.A. 9th, 1967). It is sufficient that

plaintiff is within the "target area" of defendant's unlawful antitrust practices, and that plaintiff has suffered an "antitrust injury" in his trade or business that is the proximate result of defendant's antitrust misdoings.

B. The Section 2(c) Violation - Count I.

As to the Section 2(c) violation charged by Count I of plaintiff's Complaint, as amended, the District Court held that the 5% chain store discount or rebate granted by the defendant to certain centrally billed chain store accounts, and charged back by the defendant to the plaintiff (thereby compelling the plaintiff to absorb the same), is not a brokerage or a discount in lieu of brokerage within the meaning of Section 2(c) of the Robinson-Patman Act. The Court of Appeals affirmed.

It is respectfully submitted that the narrow construction put on Section 2(c) by both the District Court and the Court of Appeals herein, is contrary to (i) the statutory language of Section 2(c), (ii)the Congressional intent reflected in the legislative history of Section 2(c), (iii) the language of this Court in *FTC* v. *Henry Broch & Co.,* 363 U.S. 166, and (iv) the application by the courts of Section 2(c) to commercial bribery cases.

Section 2(c) of the Robinson-Patman Act, as amended, provides, in pertinent part, as follows:

> "(c) It shall be unlawful for any person engaged in commerce in the course of such commerce, to pay or grant, or receive or accept, anything of value *as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof,* except for services rendered in connection with the sale or purchase of goods, wares or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such inter-

mediary is acting in favor for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid." (Emphasis ours)

In *FTC* v. *Henry Broch & Co.,* 363 U.S. 166, 168-169, 171, 80 S.Ct. 1158, 4 L.Ed. 1122 (1959), rehearing denied 364 U.S. 854 (1960), this Court, in discussing the legislative history and intent of Section 2(c), said:

> "The brokerage clause in the bill was originally directly only at outright commission payments by sellers to buyers' agents. The Senate added the phrases 'or any allowance or discount in lieu thereof' and 'either to the other party to such transaction (or his intermediary)'. S.Rep. No. 1502 74th Cong. 2d Sess. p. 7. 'This phrasing of the law was obviously designed to prevent evasion of the restriction through a mere modification of the form of the sales contract. It was assumed that large buyers would seek to convert the brokerage which they had hitherto received into an outright price reduction.' Zorn and Feldman, Business Under the New Price Laws (1937), 219" Note 9, 363 U.S. 171 at pp. 171-172)

It is to be noted that Section 2(c) prohibits not only the payment of "brokerage" where no services have been rendered in connection with the sale or purchase of goods, wares or merchandise, but *"a commission, brokerage or other compensation, or any allowance or discount in lieu thereof."* In other words, the prohibition is not limited merely to the payment of brokerage, or to an allowance or discount in lieu of brokerage.

That Section 2(c) was not intended to be so limited is also evident from the line of cases that have held concealed kick-backs and commercial bribery cases as falling within the purview of Section 2(c). See *Rangen, Inc.* v. *Sterling Nelson & Sons,* 351 F.2d 851 (C.A. 9th, 1965), cert. denied

383 U.S. 936; *Canadian Ingersoll-Rand Company, Ltd.* v. *D. Loveman & Sons, Inc.,* 227 F. Supp. 829 (N.D. Ohio, 1964); *Fitch* v. *Kentucky-Tennessee Light and Power Co.,* 136 F.2d 12 (C.A. 6th 1943).

The thrust of Section 2(c) is at direct and indirect discriminatory price concessions, unrelated to services rendered in connection with the sale or purchase of goods, wares or merchandise, whether in the form of a commission, brokerage or other compensation, or any allowance or discount in lieu thereof. Section 2(c) appears to require three elements: (1) a sale or purchase of goods; (2) the payment or receipt of brokerage *or compensation in lieu of brokerage* by the parties to the transaction, or an agent for such parties; and (3) the absence of service performed by a party to the transaction justifying the price concession obtained.

Section 2(c) is concerned with practices and guises for granting direct and indirect discriminatory price concessions to a buyer through the medium of an agent, intermediary or broker, where such agent, intermediary or broker performs no legitimate services in connection with such transaction. Because such practices and guises are deemed inherently anti-competitive in nature, and a perversion of the common law fiduciary role of an agent, intermediary or broker, such practices and guises are deemed to be *per se* violative of Section 2(c).

The instant cause, it is respectfully submitted, involves more than a simple case of direct price discrimination. It also involves a case where the discriminating seller, exercising economic dominance and control over its distributor, has acted, through the use of its central billing system, as a self-annointed "conduit" or "intermediary" for purposes of granting and paying substantial discriminatory

discounts or rebates to certain favored chain store accounts to whom plaintiff distributor sold and distributed defendant's products; and then compelled the distributor to absorb the cost of said discounts or rebates by charging same back to the plaintiff.

Defendant's practices in the instant case undermine and subvert, it is respectfully submitted, the normal marketing relationship and processes between an independent wholesale distributor and his retailers, and burden and subject the normal marketing processes with an inherently anti-competitive burden for which there is no legal justification *per se.* That is why Section 2(c) with its *per se* implications, is an appropriate remedy.

Inasmuch as the discriminatory chain store discounts or rebates charged back by the defendant to the plaintiff were not retained by the defendant, but wound up as discriminatory price concessions granted and paid by the defendant to certain favored chain store accounts, it is patently obvious that the defendant cannot claim to have rendered legitimate brokerage services in connection with plaintiff's sales of Stella D'Oro products to said favored chain stores, either as justification for said charge back or as justification for granting discriminatory price concessions by way of chain store discounts or rebates to the favored chain stores.

In the instant case, the defendant interposed itself as an "intermediary" between the plaintiff and the favored chain store accounts, in relationship to the granting or allowance of the discriminatory 5% chain store discounts or rebates to such accounts, in several respects.

First, it entered into "direct authorization agreements" with the various large chain store accounts wherein the defendant manufacturer was authorized to sell its prod-

ucts, whether directly or through its distributors, at the manufacturer's fixed wholesale prices, less an agreed discount (usually 5%) off wholesale price, to particular or designated retail store outlets of the chain store.

Secondly, through the operation of its central billing system, it directly billed (on defendant's own statement forms) the centrally billed chain store accounts for the products sold to said accounts by the plaintiff; directly received the remittances from said chain store accounts in payment of said billings; and granted or allowed said favored chain store accounts the discriminatory 5% chain store discounts or rebates.

It is to be remembered that it was the defendant, and not the plaintiff, who billed said favored centrally billed chain store accounts; that it was the defendant, and not the plaintiff, to whom the remittances from the favored chain stores, in payment of said billings, were sent and received; and that while in most cases the centrally billed favored chain store accounts deducted the 5% chain store discount allowance directly from the invoice billings of the defendant, that on occasion the defendant remitted or refunded said discount to the favored chain store account directly by separate check.

That defendant's granting and payment of the discriminatory chain store discounts to the favored chain store accounts falls within the purview of Section 2(c) of the Robinson-Patman Act, as amended, is and should be evident from an analysis of the legal relationship which the defendant manufacturer bore to the favored chain store accounts in connection with the granting and payment of said chain store discounts, and to the operation of defendant's "central billing system" as a conduit for effectuating the same.

Considered as a "seller" in relationship to the favored chain store account under the "indirect purchaser" doctrine, by reason of the defendant controlling the terms upon which such favored chain store account purchased the defendant's products from the plaintiff wholesaler, the defendant, by granting and/or paying the discriminatory chain store discount to the favored chain store in effect paid said buyer "a commission, brokerage or other compensation, or any allowance or discount in lieu thereof" within the purview and in violation of Section 2(c) of the Act.

Whether or not considered as a "seller" under the "indirect purchaser" doctrine, an analysis of the legal relationship that the defendant manufacturer bore to the centrally billed chain store accounts in effectuating the payment of the discriminatory chain store discounts allowed and granted by the defendant clearly indicates that the defendant manufacturer, through the vehicle and conduit of its central billing system, also, at the very least, acted in effect as an agent or broker intermediary of the favored chain store accounts in effectuating payment of the discriminatory chain store discounts or rebates to the favored chain store accounts; given the direct authorization agreements between the defendant and the favored chain stores, and the operation of defendant's "central billing" system.

What the defendant in effect has done is to corrupt the brokerage function for purposes of effectuating its deliberate policies of sustained and repeated price discrimination. This it did by making itself a self-annointed "conduit" for the payment of discriminatory chain store discounts to favored chain store buyers.

It is respectfully submitted that the giving or granting of said discriminatory chain store discounts by the defendant, under the factual circumstances here present constituted not only a violation of Section 2(a), but in addition constituted the payment, granting and receipt of illegal brokerage or of an illegal discount or allowance in lieu of brokerage, within the purview and in *per se* violation of Section 2(c) of the Robinson-Patman Act, as amended.

C. The Section 1, Sherman Act Violation - Count I:

The District Court has held that "no issue concerning retail price maintenance is before this court. (App. 20a)

This in the face of detailed, uncontroverted factual averments in Count I of plaintiff's Complaint, as amended, as supplemented by plaintiff's supporting affidavits filed in opposition to defendant's Motion for Summary Judgment, that the defendant "fixed" the wholesale prices at which plaintiff, and other distributors of the defendant, could resell said products to retailers, including chain stores. These factual averments are realleged in Count IV of plaintiff's Complaint, as amended, where it is charged that defendant's "fixing" of the wholesale prices at which plaintiff could resell defendant's products to retailers, constitute a violation of Section 1 of the Sherman Act.

Plaintiff contends that the "fixed" wholesale prices in the case of products sold to those favored centrally billed chain stores who received the 5% chain store discounts, *included as a fixed and integral component thereof* the 5% discount granted by the defendant to said chain stores, and charged back by the defendant to the plaintiff; and that said discounts so granted by the defendant, and charged back to plaintiff's account by the defendant, *constituted an illegal form of "price fixing"* upon the part of the defendant violative *per se* of Section 1 of the Sherman Act, for which the plaintiff is entitled to recover

by way of damages, under Section 4 of the Clayton Act, the chain store discounts charged back to him by the defendant as part of said price fixing scheme.

Paragraph 20 of Count I of plaintiff's Complaint, as amended, does not purport to limit plaintiff's cause of action herein only to Section 2(a) and Section 2(c) violations of the Robinson-Patman Act, as amended; and Count I of plaintiff's Complaint, as amended, contains sufficient factual allegations and averments of "price fixing" upon the part of the defendant to make out a prima facie case and cause of action in favor of the plaintiff and against the defendant under Section 1 of the Sherman Act.

Plaintiff's contention was also specifically spelled out in plaintiff's Reply Memorandum filed on July 16, 1975 in support of its Cross-motion for Partial Summary Judgment and in opposition to defendant's Motion for Summary Judgment, where plaintiff stated (pp. 205-206 of defendant's Appendix in the Court of Appeals):

> "It is to be noted that plaintiff's claim for money damages arising out of the 5% chain store discounts granted by defendant to certain favored centrally billed chain store accounts (as alleged in Count I of plaintiff's Complaint, as amended, and as more fully detailed in plaintiff's Affidavit and Supplemental Affidavit) is also actionable under Section 1 of the Sherman Act, in that the conduct of the defendant in fixing the wholesale prices at which plaintiff could sell Stella D'Oro products to such favored centrally billed chain store accounts (viz. at the fixed wholesale price less 5%) constitutes as a matter of law, unlawful resale price maintenance or price fixing by the defendant in per se violation of Section 1 of the Sherman Act; for which the plaintiff's consequential damages are the same 5% additional chain store discount charged back by the defendant to the plaintiff as part of the price fixing practice or conduct by the defendant. See *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1967), and numerous cases cited in Von Kalinowski, *Business Organizations - Antitrust Laws and Trade Regulation*, Vol. 16 Sec. 6.02(3)(b)."
>
> "This theory of plaintiff's case is within the purview of the *existing factual averments* set forth in Count I of plaintiff's Complaint, as amended, as more fully elaborated in plaintiff's Affidavit and Supplemental Affidavit, and within the purview of the money damages relief sought by plaintiff under Count I of plaintiff's Complaint, as amended; and should, it is respectfully submitted, be taken into consideration by this Honorable Court in determining the relief available to the plaintiff under Counts I and IV of plaintiff's Complaint, as amended."

The Court of Appeals summarily disposed of this issue, holding that "In any case, the lack of standing and antitrust injury are as much fatal to this claim as it has been shown to be to the other Count I claims." (App. 10a)

It is respectfully submitted that the District Court erred in holding that no issue concerning retail price maintenance or "price fixing" was before the Court; and that the Court of Appeals erred in holding that the plaintiff in any event could not assert said Section 1, Sherman Act claim against the defendant on the ground that the plaintiff lacked standing and had suffered no antitrust injury to qualify him, under Section 4 of the Clayton Act, to assert such claim.

The conclusion of the Court of Appeals that plaintiff lacked standing and had suffered no antitrust injury in connection with plaintiff's asserted Section 1, Sherman Act claims suffers from the same basic fallacy and error as that heretofore pointed out by plaintiff in connection

with his discussion of plaintiff's Section 2(a) claim relating to defendant's practice of paying discriminatory chain store discounts to certain favored chain store accounts to whom plaintiff had sold defendant's products, and charging said discounts or rebates back to the plaintiff.

Again, as it relates to the basic issue of plaintiff's standing to sue under Section 4 of the Clayton Act, the basic fallacy and error upon the part of the Court of Appeals lies in the failure of that Court to recognize: (1) that the 'target area" herein is two tiered in nature, and that it was not the independent retailers who "solely" occupied the target area, but the plaintiff distributor as well; and (2) that plaintiff's "injury" and measure of damages, suffered in his trade or business, are *not* duplicative of and are completely independent of any cause of action for damages that the independent retailers might have against the defendant for "price fixing", and are *directly* related to and an outgrowth of acts and conduct upon the part of the defendant that violate the Federal Antitrust Laws.

The "central billing system" used by the defendant herein, as a conduit and shield for its discriminatory and illegal pricing practices, is very similar in many respects to the distribution system used by General Foods Corp. for its institutional customers, which in *Greene* v. *General Foods Corp.*, 517 F.2d 635, 656-658 (5th Cir. 1975), cert. denied 424 U.S. 942 (1976), was found to constitute a *per se* illegal price fixing violation of the Sherman Act.

In both the *Greene* case, *supra*, and in the instant case, the defendant manufacturer "fixed" the wholesale prices at which the distributor could resell the products purchased by the distributor from the manufacturer. In the instant cause, the operation of defendant's "central billing

system" as applied to certain favored chain store accounts who were granted and received from the defendant a discriminatory 5% chain store discount as part of the "fixed" wholesale prices fixed by the defendant (wherein the billing of the favored chain store accounts was done directly by the defendant manufacturer, and payments by said chain store accounts were made directly to the defendant manufacturer rather than to the plaintiff distributor) has a direct parallel to the MFSA pricing system of General Foods Corporation which the Fifth Circuit in the *Greene* case, *supra,* found to be a *per se* violation of Section 1 of the Sherman Act.

If anything, to paraphrase the *Greene* case, *supra,* what emerges from the record in the instant cause "is a vast system for controlling resale prices" even more comprehensive, encompassing and perniciously anti-competitive in nature than that which we find in the *Greene* case, *supra,* and in *United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707, 64 S. Ct. 805, 88 L.Ed. 1024 (1944) relied upon by the Fifth Circuit in its decision in the *Greene* case.

For what we have here is not only unabashed price fixing by the defendant at both the wholesale and retail distribution levels, but in addition an all encompassing and perniciously anti-competitive distribution system wherein the defendant manufacturer imposed upon its supposedly "independent" wholesale distributors, including plaintiff, the absorption by said distributors of discriminatory chain store discounts granted by the defendant manufacturer to favored chain stores; "products restraints" that barred the plaintiff distributor from selling or offering for sale "any baked products manufactured by any other persons, firm or corporation", whether or not competitive with the products of the

defendant; "territorial restraints" that barred and prevented the plaintiff from competing with other independent distributors of the defendant; and pricing on a geographic price zone basis that "fixed" both the wholesale and retail prices at which defendant's products could be sold.

The "antitrust injury" and damages suffered by the plaintiff as a consequence of defendant's practice of granting the 5% chain store discounts to certain favored centrally billed chain store accounts, and charging same back to the plaintiff, has already been detailed in connection with plaintiff's Section 2(a) claim hereinbefore discussed.

D. Count III - The Section 2(a) Violation:

Count III of plaintiff's Complaint, as amended, charges the defendant with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13(a)), on the ground that the plaintiff was compelled by the defendant to pay higher prices for the defendant's products, of like grade and quality, than the prices paid by certain other favored distributors of the defendant for the same products. This price discrimination was effected, the plaintiff charges, by the fact that the defendant sold its products to the plaintiff at a trade discount of only 26% compared to the higher trade discount of 29% at which defendant sold its products, of like grade and quality, to certain other favored distributors of the defendant, including defendant's distributors in the Detroit, Michigan, Cleveland, Ohio, and Pittsburgh, Pennsylvania area located in the same "geographic price zone" as the plaintiff. Plaintiff claims damages from the defendant, under Count III, in an amount equal to the 3% higher price differential which plaintiff paid for defendant's products compared to the

lower prices at which defendant sold its products, of like grade and quality, to its distributors in the Detroit, Michigan, Cleveland, Ohio and Pittsburgh, Pennsylvania areas. It is undisputed that said 3% higher price differential amounted to $260,127.75 for the period from 1/1/64 to 1/3/72 on purchases of $8,670,825.00 (the defendant being charged with fraudulent concealment of said price differential under Count III, as amended); or $131,528.90 for the four year period from 3/22/68 to 1/3/72 on purchases of $4,384,296.69.

The District Court granted summary judgment in favor of the defendant and against the plaintiff on Count III of plaintiff's Complaint, as amended.

The Court of Appeals affirmed, holding that plaintiff's claim herein must fail absent a showing by him that as a disfavored purchaser that he "competed" with the favored wholesale distributors, viz. the defendant's distributors in Detroit, Michigan, Cleveland, Ohio, or Pittsburg, Pennsylvania who purchased Stella D'Oro products from the defendant at a trade discount of 29% compared to the 26% trade discount at which said products were sold to plaintiff by defendant. The Court of Appeals further held that such competition as did exist between the plaintiff and the Detroit, Michigan distributor in the Benton Harbor-St. Joseph, Michigan area, was no more than "de minimus" or sporadic and unlikely to cause a "lessening of competition." The Court held that "plaintiff must prove this competition to obtain a remedy despite the fact that defendant may have imposed or encourage territorial restraints that may have made competition among distributors unlikely." (App. 10a-12a)

Petitioner respectfully submits that the lower Courts erred herein for the reasons hereinafter set forth.

Prior to its amendment by the Robinson-Patman Act, Section 2(a) of the Clayton Act prohibited and condemned price discrimination whenever the effect of such price discrimination *"may be" substantially* to:

> (1) *"lessen competition in any line of commerce"* (the so-called "lessening of competition" test); or
>
> (2) "tend to create a monopoly in any line of commerce."

The Robinson-Patman amendment to Section 2(a) of the Clayton Act added an alternative third test; i.e. it prohibited price discrimination whenever the effect thereof "may be" substantially to:

> *"injure, destroy or prevent competition with any person,* who either grants or knowingly receives the benefits of such discrimination *or with customers of either of them.*" (the so-called "injury to competition" test).

Even prior to its amendment by the Robinson-Patman Act of 1936, this Court in *Van Camp & Sons* v. *American Can Company,* 278 U.S. 245 (1929) held that Section 2(a), as it then read, was applicable to injury at the customer or secondary level, as well as to primary line cases between competing sellers. In that case this Court pointed out that price discrimination is no less clear an evil when it produces *"a lessening of competition" at the customer or secondary level,* as compared to a lessening of competition at the seller or primary level.

The Supreme Court's decision in the *Van Camp* case, *supra,* was followed by the Seventh Circuit in *American Can Co.* v. *Ladoga Canning Co.,* 44 F.2d 763 (C.A. 7, 1930).

There is nothing in the original language of Section 2(a) of the Clayton Act, or in the language of Section 2(a) as amended by the Robinson-Patman Act, which limits or was intended to limit the application of the "lessening of competition test", where the effect of price discrimination may be to substantially "lessen competition in any line of commerce," to primary line cases only.

Nor is there anything in the original language of Section 2(a) of the Clayton Act, or in the language of Section 2(a) as amended by the Robinson-Patman Act, which limits or was intended to limit the application of the "lessening of competition test" to secondary line cases involving only competing purchasers.

This is clearly pointed out in *Atlas Building Products Co.* v. *Diamond Block and Gravel Co.,* 269 F.2d 950 (C.A., 10th, 1959), cert. denied 363 U.S. 843 (1960), a primary line case brought under Section 2(a), where the Court said:

> "In the first place, there is nothing in the statute to indicate that its prohibitions are restricted to price discriminations between competing purchasers in the same area. The statute is not couched in terms of locality. See *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 734, 65 S.Ct. 961, 89 L.Ed. 1320. The purpose of this Section as an integral part of the anti-trust legislative scheme is to prevent price discriminations in commerce which tend to injure competitive enterprise. To that end, it forbids a seller from charging different customers different prices for the same products with the effect of lessening competition. And, we know that market power is a ready means toward competitive injury. See Sen. Rep. 1502, 74th Cong. 2 Sess. 4 (1936); H.R. Rep. 2287, 74th Cong. 2 Sess., 8 (1936) 80 Cong. Rec. 9417 (1936). Furthermore, geographic price discrimination between noncompeting purchasers was as-

serted and sustained under both Sections 2(a) and 3 in *Moore* v. *Mead's Fine Bread,* 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145. Indeed, the court pointed out that such practices were prohibited under the Clayton Act even before the Robinson-Patman Amendment, citing *Porto-Rico* v. *American Tobacco Co.,* 2 Cir. 30 F.2d 234, 237."

Since the Robinson-Patman Act amendment to Section 2(a) of the Clayton Act, adding the third alternative competitive injury test (which requires competition between the disfavored purchaser and the favored purchaser), most, if not virtually all secondary line cases—not confronted with the obstacle of "territorial restraints" barring competition between distributors at the secondary level, as here—have been brought under this third alternative test.

That, however, does not negate the fact that *original Section 2(a) still provides a remedy in an appropriate secondary-line case, even in the absence of competing purchasers.*

In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* this Court pointed out that "the antitrust laws . . . were enacted for the protection of *competition,* not *competitors.*"

In *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 336-337 (1962), this Court held that the "relevant geographic market" and the "relevant product market", in any line of commerce should correspond with or reflect the "commercial realities" and be "economically significant;" and recognized that "well defined sub-markets may exist which, in themselves, constitute product markets for antitrust purposes.

The "commercial realities" are that the "relevant product market" in the instant case, as it relates to Count

III, is of course "the specialized lines of ethnic bakery products, being largely Italian, Jewish and old country style cookies and bakery products, including a dietetic line thereof" manufactured and produced by the defendant manufacturer, and sold to plaintiff and its other distributors.

In view of the fact that defendant's overall pricing system was predicated on a ''geographic price zone system'' consisting of 6 different geographic price zones, and in view of the further fact that the defendant placed the plaintiff distributor in geographic Price Zone No. 2, together with its distributors in Detroit, Cleveland and Pittsburgh (all being in the same Price Zone No. 2), the *commercial realities* are, it is respectfully submitted, that Price Zone No. 2 defines the perimeters of the "relevant geographic market".

The "commercial realities" are that the plaintiff by reason of geographic price zone "fixing" constraints imposed by the defendant, was compelled to sell Stella D'Oro products to his retailers at the *same* fixed wholesale prices at which defendant's distributors in Detroit, Cleveland and Pittsburgh sold like products (since they were all in geographic Price Zone No. 2), even though the plaintiff, by reason of the 3% price discrimination differential, had to pay 3% more to buy said products from the defendant than did the Detroit, Cleveland and Pittsburgh distributors in the same Price Zone No. 2—thereby adversely affecting plaintiff's "cost of goods", plaintiff's margin of profit in a low profit margin industry, and plaintiff's ability to meet the increased costs of doing business, *thereby lessening competition.*

The "commercial realities" are that the defendant barred the plaintiff from competing with the Detroit

distributor in the Benton Harbor-St. Joseph, Michigan area; even though that area was embraced in plaintiff's original assigned territory, and even though plaintiff had theretofore competed with the Detroit distributor in that area during the period from 1965 to 1967.

The "commercial realities" are that the defendant through its policy of territorial restraints insulated and barred its distributors, including the plaintiff, from competing with one another.

The "commercial realities" are that these pricing policies and practices by the defendant, hereinbefore graphically illustrated, put the plaintiff in the position of being "competitively boxed-in", the effect of which "may be substantially to lessen competition."

Where the price discrimination has been substantial in amount and permanent or continuous in duration, the Courts and the Federal Trade Commission have readily inferred from a variety of factors, such as loss of profits, low profit margins, or the presence of highly competitive conditions, etc., a substantial lessening of ability to compete on the part of the disfavored customer, and have readily inferred that the effect of such discrimination "may be substantially to lessen competition." See *United Biscuit Co. of Am.* v. *FTC,* 350 F.2d 615 (7th Cir. 1965), cert. denied 383 U.S. 926 (1966); rehearing denied 388 U.S. 924 (1967); *C.E. Niehoff & Co.* v. *FTC,* 241 F.2d 37 (7th Cir. 1957) mdf'd 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370 cert. denied 355 U.S. 941, rehearing denied 355 U.S. 968 (1958); *Whitaker Cable Corp.* v. *FTC,* 239 F.2d 253 (7th Cir. 1956) cert. denied 353 U.S. 938 rehearing denied 353 U.S. 962 (1957); *E. Edelman & Co.* v. *FTC,* 239 F.2d 152 (7th Cir. 1956), cert. denied 355 U.S. 941, rehearing denied 356 U.S. 905 (1958).

As pointed out in Von Kalinowski, *Business Organizations, Anti-trust Laws and Trade Regulation,* Vol. 16C, Ch. 28, at pp. 28-35:

> "As to competitive injury at the buyer or secondary level, the courts and Commission similarly have rejected the quantitative approach. When, however, the discrimination has been substantial in amount and permanent or continuous in duration, the courts and the Commission have readily inferred competitive injury from meager evidence of 'low profit margins' and 'highly competitive' conditions."

See also *FTC* v. *Morton Salt Co.,* 334 U.S. 37, 68 S.Ct. 822, 829, 92 L.E. 1196 (1948) where this Court said:

> "Congress intended to protect a merchant from competitive injury attributable to discriminatory price on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock."

In the instant case, the price discrimination, as it relates to the plaintiff, has been *substantial, systematic* and *sustained.* It has been substantial, systematic and sustained in that the discrimination has involved all the products that the plaintiff purchased from the defendant (the plaintiff being barred from selling or offering for sale the bakery products of other manufacturers, whether or not competitive with the products sold by the defendant) during the period from January 1, 1964 to and including Jan. 3, 1972 (admittedly totaling $8,670,925.00); for which the plaintiff paid the defendant a $260,127.75 higher price differential for said merchandise than plaintiff would have paid had defendant sold its merchandise to plaintiff at the higher trade discount of 29% which it sold said products, of like grade and quality, to certain favored distributors

of the defendant, including defendant's distributors in the Detroit, Michigan, Cleveland, Ohio and Pittsburgh, Pennsylvania area located in the same geographic price zone as the plaintiff.

A discriminatory price differential of $260,127.75, it is respectfully submitted, is not unsubstantial, given the low profit margin at which the plaintiff operated.

Thus, for the four (4) year period from January 1, 1968 to and including January 3, 1972 on total sales of $4,683,960.35, the plaintiff made a total net profit of $77,585.15 (or an average of $19,396.29 per year); or an average annual net profit margin during that time period of 1.655%. For the same four (4) year period, the plaintiff paid a discriminatory price differential totalling $140,518.80 (3% of the $4,683,960.35). This despite the uncontroverted fact that the plaintiff, during the same four (4) year period, and even prior thereto, was the largest distributor of the defendant in the country in terms of dollar volume of purchases of defendant's products.

Plaintiff avers that said 3% price discrimination, within the framework of the price discrimination, centrally billed chain store discounts, product and territorial restraints and practices aforesaid imposed upon the plaintiff by the defendant, tended to, and did, in fact, substantially lessen competition, in that the plaintiff with his selling prices, product lines and sales territory, restricted and "frozen in" by the operation of said restraints, found himself paying 3% more for defendant's products, compared to what defendant's favored distributors in the Detroit, Michigan, Cleveland, Ohio and Pittsburgh, Pennsylvania area paid for Stella D'Oro products of like grade and quality; which additional "fixed" cost

burden, given plaintiff's inability to adjust his selling prices by reason of the restraints aforesaid, adversely affected plaintiff's earnings, his ability to meet increased other costs of doing business, and generally adversely affected his ability to compete and engage in business as a distributor of the defendant. Net result: Termination of plaintiff's distributorship by the defendant.

See the graphic illustration, hereinbefore set forth, summarizing, the anti-competitive impact and consequences resulting from the price discrimination, price fixing, chain store discounts, products and territorial restraints imposed by the defendant on the plaintiff.

It is respectfully submitted that where, is here. the discriminating seller, by illegal territorial or other restraints, bars, or prevents its disfavored customer from competing with its favored customers, that the discriminating seller should be estopped, as a matter of law, from asserting the lack of competition between its disfavored customer and its favored customer as a defense to a Section 2(a) violation; particularly where, as here, a history of competition between the disfavored customer and the favored customer existed until the discriminating seller barred and cut off said competition, and where, but for the restraints and bar imposed by the discriminating seller such competition "may" or could have grown of flourished. To do otherwise would permit a discriminating seller to "immunize" its price discrimination, and to violate and frustrate Section 2(a) with impunity by the simple expedient of imposing territorial restraints upon its distributors which prevent said distributors from competing with one another. See *Perkins* v. *Standard Oil Company*, 395 U.S. 642, 647-648, 89 S.Ct. 1871, 1984, 23 L.Ed.2d 599, rehearing denied 396 U.S. 871 (1969).

The application of the doctrine of estoppel (a doctrine not unknown to the field of antitrust law, as witness the *per se* concept of illegal restraints) would certainly appear to be appropriate here under the facts circumstances of the instant cause.

E. Counts II & IV - The "Products Restraints" In Violation Of Section 1 of the Sherman Act and Section 3 of the Clayton Act:

Counts II and IV of plaintiff's Complaint, as amended presents the question as to whether the contractual "products restraints" imposed on the plaintiff distributor by the defendant manufacturer, which barred and prohibited the plaintiff from selling or offering for sale "*any* baked products manufactured by any other person, firm or corporation", whether or not competitive with the products manufactured by the defendant, during the terms of plaintiff's distributorship, and which barred the plaintiff from selling the "Pizzelle" wafers and "Lady Finger" sponge cakes manufactured by other bakery manufacturers, *unless purchased through the defendant,* constitute unlawful and unreasonable restraints, and/or an illegal "tie-in arrangement" in *per se* violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act?

The Court of Appeals held that said restraints are not unreasonable restraints *per se,* and must therefore be tested by the rule of reason, and that said product restraint insofar as it barred the plaintiff from selling Pizzelle wafers and Lady Finger sponge cakes manufactured respectively by the Caroline Baking Company and Specialty Lady Fingers Co., *unless purchased through the defendant,* did not constitute an illegal "tie-in arrangement" in *per se* violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

It is respectfully submitted that Court of Appeals erred in so holding.

The "product exlusivity" restraint herein which barred the plaintiff from selling or offering for sale "any baked products manufactured by any other person, firm or corporation", whether or not competitive with the products manufactured by the defendant during the term of plaintiff's distributorship, serves no valid or redeeming distributive function and its purpose is pure and simply to restrain trade and competition (1) by barring the plaintiff from selling or offering for sale "any" baked products of *any* other bakery manufacturer, whether or not such other baked products are or are not competitive with those manufactured by the defendant, and (2) by denying and foreclosing to any and all other bakery manufacturers whether or not their products are or are not competitive with those of the defendant access to the plaintiff as a customer and market for their products.

It should be kept in mind here, that the plaintiff was an independent businessman and distributor to whom title to defendant's products passed upon the sale thereof by the defendant to the plaintiff, and not merely a "selling agent."

The restraint here, it is respectfully submitted, has no redeeming features that would necessitate or justify it being tested by the "rule of reason" applicable to non-per se restraints challenged under Section 1 of the Sherman Act, and is clearly unreasonable *per se.*

Insofar as said restraint barred the plaintiff from selling Pizzelle wafers and Lady Finger sponge cakes manufactured respectively by the Caroline Baking Company and Speciality Lady Fingers Co., *unless purchased through the defendant,* it is the position of the plaintiff

that the operation of said restraint constituted an unreasonable restraint and illegal "tie-in arrangement" in *per se* violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

The essence of a "tying arrangement" is the unlawful and anticompetitive restriction or condition that it imposes on a seller's right to sell its particular product, and on a buyer's right to buy a particular product.

The "tie-in" lies in the requirement that the plaintiff, and other distributors of the defendant, cannot purchase said Lady Finger and Pizzelle bakery products of other bakery manufacturers, *but only through the defendant.*

The anti-competitive nature of the "tying arrangement" is not necessarily limited to the presence of a "tied product"; it can, it is respectfully submitted, be equally anti-competitive in nature where the party imposing the "tying arrangement" requires the party against whom it is imposed to buy the products of others *only through the party imposing that arrangement.*

The purpose and effect of said restraint and tying arrangement was to suppress competition, in that (i) it denied to the plaintiff, and to other distributors of the defendant upon whom defendant imposed the same restraint and tying arrangement, free access to the market for such products manufactured by manufacturers, other than the defendant; (ii) denied to such other manufacturers the right and opportunity to sell their products directly to the plaintiff (and other distributors of the defendant); and (iii) forced the plaintiff, and other distributors of the defendant, to purchase said Lady Finger and Pizzelle Bakery product *only through the defendant,* or otherwise not at all, and at a price substantially higher (14.30% more in the case of Pizzelle wafers and 16.75% more for

the Lady Finger cakes) than plaintiff would have been able to purchase said products directly from the manufacturers thereof, but for said restraint and tying arrangement. The dollar volume of purchases by the plaintiff affected by said restraint and tying arrangement is not insubstantial; and this is exclusive of the substantial dollar volume of purchases made by other distributors of the defendant (in at least 11 states and the District of Columbia as it relates to the Pizzelle wafers) who were subjected by the defendant to the same restraints and tying arrangements.

It is respectfully submitted that there are no redeeming features in said restraints to negate the pernicious and inherently anticompetitive purposes and effect of said restraints. For the reasons hereinbefore set forth, therefore, said restraints can and should properly be treated as *per se* unreasonable restraints violative of both Section 1 of the Sherman Act and Section 3 of the Clayton Act.

See *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed. 2d 545 (1958); *International Salt Co.* v. *United States,* 332 U.S. 392, 68 S.Ct. 12, 98 L.Ed. 20 (1947); *Klors* v. *Broadway-Hale Stores,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *Standard Oil Co. of California* v. *United States,* 337 U.S. 293, 311, 69 S.Ct. 1051, 93 L.Ed. 1371 (1948); *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.,* 394 U.S. 495, 504, 89 S.Ct. 1252, 22 L.Ed. 2d 495 (1969).

CONCLUSION

The issues here presented for review, particularly those relating to Petitioner's standing under Section 4 of the Clayton Act (relating to Count I of plaintiff's Complaint, as amended), and that relating to the "lessening of competition" tests under Section 2(a) of the Clayton Act presented by Count III of plaintiff's Complaint, as amended, are of sufficient moment and importance, it is respectfully submitted, to merit review and the definitive judgment of this Honorable Court.

Wherefore, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted, and that upon hearing and review of this cause that the decision of the Court of Appeals for the Seventh Circuit in this cause dated November 15, 1978, be reversed, set aside and held for nought, and this cause remanded to said Court of Appeals with appropriate directions.

Respectfully submitted,

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No. 78-1252

In the
Supreme Court of the United States

October Term, 1978

EDWARD Q. LUPIA,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC.,
a New York corporation,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX TO APPENDIX

APPENDIX A

No. 77-2142

EDWARD Q. LUPIA,

Plaintiff-Appellant,

v.

STELLA D'ORO BISCUIT CO., INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois
No. 72-C-738—JOEL M. FLAUM, *Judge*

Argued September 15, 1978—Decided November 15, 1978

Before SPRECHER, *Circuit Judge*, NICHOLS, *Judge*,* and BAUER, *Circuit Judge*.

NICHOLS, *Judge*. Plaintiff-appellant, Edward Q. Lupia, was an exclusive distributor of defendant's ethnic bakery products in the Chicago metropolitan area from 1961 until 1972. Defendant-appellee, Stella D'Oro Biscuit Company, Inc., is a New York corporation. In 1972, Lupia brought an action against Stella D'Oro, alleging that Stella D'Oro's marketing practices had violated various provisions of the Federal antitrust laws, specifically section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, section 3 of the Clayton Act, 15 U.S.C. § 14, and sections 2(a) and 2(c) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (c). Plaintiff seeks monetary relief under section 4 of the Clayton Act, 15 U.S.C. § 15, the remedial provision allowing recovery of treble damages by "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * *." The terms of the agreements between the parties and the defendant's allegedly illegal practices are detailed below.

* Judge Philip Nichols, Jr., of the United States Court of Claims is sitting by designation.

Both plaintiff and defendant filed motions for summary judgment in the district court. The motions were based on a substantial record assembled by discovery and affidavits, establishing beyond the mere allegations of the pleadings, what the plaintiff was and was not able to prove. Judge Flaum granted summary judgment to defendant on all four counts of the complaint, and denied summary judgment to plaintiff. We affirm.

Before discussing the contentions of the parties regarding the antitrust claims, it is necessary to comment on the role of a summary judgment in antitrust cases. In any type of litigation, the standard for granting summary judgment is strict. In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1961), *citing Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944), the Supreme Court enunciated that standard, declaring that summary judgment was proper.

> * * * "only where the moving party is entitled to a judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * *." 368 U.S. at 467.

Poller is the classic case cited for the proposition that courts should exercise extreme caution when deciding to grant or deny summary judgment in antitrust cases. In *Poller,* plaintiff alleged that CBS's cancellation of an independent UHF station's network affiliation was part of a conspiracy to restrain UHF broadcasting in the Milwaukee area. The majority in *Poller* believed that plaintiff should be given the opportunity to pursue discovery and attempt a showing of conspiracy at trial. Mr. Justice Clark's majority opinion, in reversing the D.C. Circuit's grant of summary judgment, stated that:

> * * * We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. * * * [Footnote omitted—368 U.S. at 473.]

But this court and other circuit courts have not interpreted *Poller* or similar statements by other courts to preclude use of summary judgment in antitrust litigation. *See, e.g., Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966). The issue in *Crest* was whether the court could decide if the parties were *in pari delicto.* Stating that the court did not quarrel with the *Poller* view that summary judgment should be used sparingly in cases where "*motive and intent play leading roles,*" this court affirmed grant of summary judgment despite *Poller* because the factors cited in *Poller* (proof of subjective states of mind, genuine issues of material fact) were not present there. 360 F.2d at 899-900, (emphasis in original).

A similar situation exists in the present case. The intent of Stella D'Oro is not at issue. Rather, the issue is whether plaintiff has alleged any facts demonstrating a violation that "fits" within the requirements for an antitrust recovery, a question of law that can be answered by the court. *Compare ALW, Inc.* v. *United Air Lines*, 510 F.2d 52 (9th Cir. 1975). Here the Ninth Circuit affirmed grant of summary judgment for defendant on antitrust claims. The court held that plaintiff had merely alleged the existence of a "contract, combination, or conspiracy," under section 1, and that once defendant rebuts such an allegation by affidavit, plaintiff must set forth factual support of the conspiracy's existence in order to withstand defendant's motion for summary judgment. The court also dismissed plaintiff's claim under section 2 of the Sherman Act, since plaintiff showed "no monopoly power or dangerous probability thereof" existing in the relevant market. 510 F.2d at 57.

Although the strict standards for grant of summary judgment, and the complex legal and factual nature of antitrust cases have made many courts reluctant to grant summary judgment in antitrust cases, technically there is no requirement that judges exercise greater caution in granting summary judgment in these cases than in any other. The Advisory Committee note accompanying Fed. R. Civ. P. 56 (1938) states that "[t]his rule [gov-

erning summary judgment motions] is applicable to *all* actions." (emphasis supplied.)

Indeed, the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also, (without intending any slur on plaintiff here), the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation, see *Poller, supra,* at 474 (Harlan, J. dissenting). The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way. Judge (now Chief Judge) Skelly Wright, in a libel case, *Washington Post Co.* v. *Keogh,* 365 F.2d 965 (D.C. Cir. 1966), noted that:

> * * * Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. * * * [*Id.* at 968.]

In *Mintz* v. *Mathers Fund, Inc.,* 463 F.2d 495, 498 (7th Cir. 1972), this court has stated:

> * * * Appellate courts should not look the other way to ignore the existence of the genuine issues of material facts, but neither should they strain to find the existence of such genuine issues where none exist. [Citation omitted.]

As there held, mere recitation of antitrust claims in a complaint does not render that complaint immune from summary disposition, if uncontradicted facts show otherwise. If a trial would serve no useful purpose, summary judgment is proper. *Solomon* v. *Houston Corrugated Box Co., Inc.,* 526 F.2d 389, 393-94 (5th Cir. 1976). Assuming then, as is proper in summary judgment cases, that all facts as stated by the party opposing grant of summary

judgment are true, we now examine the case at hand to determine if defendant is entitled to summary judgment.

Price Discrimination Among Retailers

Count I of plaintiff's complaint alleges that defendant granted favored retail chain stores a 5 percent discount on the retailer's wholesale price charged, and then charged back the cost of that discount to the plaintiff-distributor. Defendant's system operated as follows: plaintiff generally bought bakery products from defendant for the retailer's wholesale price (RWP) minus 26 percent. Plaintiff sold and delivered the products to retail food stores through driver-route salesmen employed on a commission basis. The salesmen would collect the payments from the retailers, and return them to plaintiff. With chain stores, however, a different system was used. Plaintiff would still buy the goods, but the salesmen-drivers did not collect payment from the retailers; rather, they returned an invoice to plaintiff, taking their commissions. Plaintiff sent the invoice to defendant, and defendant billed the chain stores directly, deducting a discount of generally 5 percent. In its monthly billings to plaintiff, defendant charged him for the 5 percent discount.

Since the defendant did not make this "discount" available to an independent purchaser, argues plaintiff, it violated the price discrimination prohibitions of the Robinson-Patman Act, sections 2(a) and 2(c), 15 U.S.C. §§ 13(a) and (c). Section 2(a) of the Act prohibits discrimination in price between different purchasers of commodities of like grade or quality where:

> * * * [T]he effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *. [15 U.S.C. § 13(a).]

In dismissing the 2(a) claim, Judge Flaum ruled that (a) plaintiff lacked standing to challenge any price discrimi-

nation imposed on *retailers,* and (b) plaintiff had alleged no injury to himself or his business that resulted from defendant's discriminatory practices. The reason given for lack of standing was that the plaintiff was not within the "target area," the proper parties with standing being the retailers, not parties here. As to lack of injury, Judge Flaum says plaintiff failed to show he could have sold to the chain stores if the 5 percent discount had not been granted them. Thus, plaintiff does not have any claim under section 2(a).

In holding that plaintiff was not within the "target area," Judge Flaum was not exactly coining a phrase. The authority he refers to, *Multidistrict Vehicle Air Pollution M.D.L. No. 31* v. *Automobile Manufacturers Ass'n, Inc.,* 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfg. Ass'n,* 414 U.S. 1045 (1973), carefully and exhaustively analyses the various circuit positions on "standing to sue," counting the number that purport to measure standing by the "target area" test and those that require that the statutory "injury" be a "direct" one. In n.7, p. 127, that court expresses uncertainty about the Seventh Circuit position but considers it closer to "target area" than any other. As stated in *Multidistrict Vehicle Air Pollution, supra* at 125, the purpose of both standing rules is to limit the "availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws." It would appear the circuits all view the treble damages suit as too lethal a cannon to put in the hands of anyone who has suffered only an "indirect," "secondary," or "remote" injury. Since *Multidistrict Vehicle Air Pollution, supra,* which expresses doubt about the position of the Fifth Circuit, that circuit has come down hard for the "target area" test in *Jeffrey* v. *Southwestern Bell,* 518 F.2d 1129 (1975). The recent Supreme Court decision, *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), does not speak expressly in terms of standing to sue, but at any rate holds that a conspiracy to fix prices of cement building blocks to general contractors cannot be sued on under section 4 by owners whose cost of new construction may be in-

directly enhanced, none of the contractors being parties to the suit. Likewise, not only must the injury be direct, but it must be of the kind the antitrust laws were written to guard against. This was fatal to the suit under section 4 in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977), where Brunswick Corp. had purchased certain failing bowling centers to keep them in business, and the injury to the plaintiffs, independent bowling centers, was loss of the additional business and profit that would have inured to them if the failing centers had been allowed to fail, and thereby had ceased to compete. Here again the matter is not stated in terms of standing to sue. The courts demand, either in terms of a standing doctrine or in terms of a requirement of *antitrust* damages (as in *Brunswick, supra*), that recovery be confined to those who have been injured by restraints imposed by defendant on competitive forces in the economy. *GAF Corp.* v. *Circle Floor Co.,* 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973). One commentator has noted that the courts are uncertain as to the precise relationship between "standing" and the requirement of "antitrust damages." M. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977,* 77 Colum. L. Rev. 979, 996 (1977). The Ninth Circuit in *John Lenore & Co.,* v. *Olympia Brewing Co.,* 550 F.2d 495 (9th Cir. 1977), seems to merge the requirement of "antitrust injury" with the general standing barriers which all antitrust planitiffs must overcome. Judge Hayes in the *GAF* case, *supra,* implies that "standing" and "antitrust damages" are two different methods of viewing the requirement of "injury to business or property" for section 4 purposes, when he states:

> * * * [W]hether GAF is viewed as not having "standing to sue" for these alleged violations of the antitrust laws, or, is viewed as not having sustained anticompetitive damages from the particular acts alleged, the result under § 4 is the same, and the dismissal of the complaint for failure to state a claim upon which relief can be granted was correct. [463 F.2d at 759.]

The Supreme Court's *Illinois Brick Co.* case, *supra,* reversed a decision of this court, *State of Illinois* v. *Ampress Brick Co.,* 536 F.2d 1163 (1976), which treated the matter as one of standing to sue and held that one who suffered an indirect injury could have standing. We relied on *Malamud* v. *Sinclair Oil Co.,* 521 F.2d 1142, 1151 (6th Cir. 1975), the authority of which case would seem now to require reconsideration.

One of the beauties of modern summary judgment is that it need not be confined to threshold issues such as standing. It may invoke any reason why a claim or defense must succeed or fail. Thus, whatever reasons there may once have been to attack "injury" or "target area" problems early by saying they relate to standing, on summary judgment this classification loses its urgency, and becomes more or less moot. It would not do plaintiff any good to persuade us to select, as Judge Flaum did, among the various section 4 standing and injury doctrines. It is clear plaintiff could not prevail under any of them. The independent retailers, who did not enjoy the 5 percent rebate, solely occupied the "target area" and plaintiff improperly sues as surrogate for them. As regards "antitrust injury," plaintiff does not pass the *Brunswick* test. The defendant's anticompetitive action, the 5 percent rebate to chain stores, would have been equally anticompetitive if plaintiff had not been required to absorb it. That he was so required is, therefore, not an "antitrust injury" but one reflecting harsh treatment of a distributor by a manufacturer. If defendant had absorbed the rebate, there would have been no injury, yet the anticompetitive nature of its policy would not have been affected one iota. So it is not an "antitrust injury." Judge Flaum found that plaintiff was unable to raise an issue of fact that it could have sold to the chains without the rebate. This serves to distinguish *Greene* v. *General Foods Corp.,* 517 F.2d 635 (5th Cir. 1975), *cert. denied,* 424 U.S. 942 (1976), otherwise quite like this case on its facts, and heavily relied on by plaintiff here. It was found Greene, a distributor, could have sold to his fixed price customers at higher prices than General Foods would allow, and with higher prices there, Greene could have reduced his prices to unfixed price accounts and thereby competed more effectively with other distributors. *Id.* at 643. Though the case was decided after trial and "standing" terminology is not used, it is clear Greene placed himself within the "target area" and demonstrated "antitrust injury" in a manner not equalled by the plaintiff herein. There is no further issue of fact to be decided: the issue is whether the facts as plaintiff presented them, taking plaintiff's version as true, allow plaintiff to assert an antitrust claim under section 2(a). We hold that he may not and affirm the grant of summary judgment to defendant on the 2(a) claim.

The Brokerage Claim in Count I

Judge Flaum also ruled that plaintiff had not shown that the 5 percent discount was "in lieu of brokerage" as required to establish a violation of section 2(c) of the Robinson-Patman Act. Section 2(c) prohibits the payment or acceptance of a "commission, brokerage or other compensation, or any allowance of discount in lieu thereof," except for services rendered in connection with a sale of goods. 15 U.S.C. § 13(c).

Section 2(c) does not, as plaintiff maintains, cover all indirect price concessions. Section 2(c) was enacted in order to prevent discriminatory rebates granted large sellers under the guise of "brokerage fees" never actually earned. Congress outlawed unearned brokerage fees *per se* in order to force sellers to confine their discriminatory practices to those dealings whose effect could be more readily measured by the competitive yardstick of the 2(a) test. *Federal Trade Comm.* v. *Simplicity Pattern Co.,* 360 U.S. 55, 68-69 (1959); *see also* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). But nowhere has plaintiff shown how these discounts are brokerage or discounts in lieu thereof. The discount is straightforward and not disguised in any manner. Thus, a *per se* rule eliminating examination of competitive effects, used in brokerage cases and discounts in lieu of

brokerage, where anticompetitive practices and effects are hard to identify, is neither necessary nor proper here. Thus, we return to the 2(a) test, which requires an examination of competitive effects on plaintiff, effects which plaintiff fails to demonstrate.

The Sherman Act Allegation in Count I

Plaintiff objects to Judge Flaum's dismissal of the Sherman Act section 1 claim allegedly lurking in Count I.

Plaintiff argues that the 5 percent discount constituted an illegal form of price fixing because the discounts were "a fixed and integral component of" the "fixed" wholesale price. Plaintiff asserts that a price-fixing claim was inherent in paragraph 20 of its complaint. But paragraph 20 does not even cite Sherman section 1, and prior pleadings and rulings of Judge Flaum indicate that the price-fixing violation alleged in Count I had been understood to be excluded from this action both by the parties and the court. In any case, the lack of standing and antitrust injury are as much fatal to this claim as it has been shown to be to the other Count I claims.

Price Discrimination Among Distributors

The gravamen of plaintiff's Count III claim is that defendant granted a 29 percent trade discount to some distributors and a 26 percent discount to plaintiff, thus committing price discrimination in violation of section 2(a) of the Robinson-Patman Act. Plaintiff's claim fails as he does not allege that any competition existed between the favored and disfavored wholesalers.

As discussed above with regard to standing, the maintenance of healthy competition is the focus of the antitrust laws and remedies. Plaintiff notes that section 2(a) prohibits price discrimination when the effect may be "substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a).

Therefore, he argues, he need only show a general threat to competition in any market to effect his own recovery. But plaintiff's argument ignores the case law requiring that, for a private antitrust action, a plaintiff who is a customer of the discriminating defendant and not a direct competitor of that defendant (a plaintiff involved in "secondary line competition") has standing only to raise those sales which are injurious to his competition. *Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974). Plaintiff must show that he competes with those customers receiving the favored prices. *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F.2d 1, 7 (7th Cir. 1949); 16H J. Von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulations §68.04 (1978), and cases cited therein.

Cases cited by plaintiff in support of the proposition that plaintiff need not show that his own competitors are receiving a favored price are cases where the plaintiff was a competitor of the very defendant who is charging the discriminatory prices. In these so-called "primary line" cases, the parties to whom defendant is granting favored prices need not be direct competitors of the plaintiff, since it is assumed that in that situation, defendant has the ability to seduce customers of plaintiff with an offer of lower prices while maintaining profits by a discriminatory charge of higher prices to "steady" or obligated customers. But this advantage of defendant is of no consequence to plaintiff if plaintiff does not compete with the defendant.

Atlas Building Products v. *Diamond,* 269 F.2d 950 (10th Cir. 1959), cited extensively in plaintiff's brief to support the argument that he need not show his own competitive situation, is really a "primary line" case concerned with geographic price differentials. And Judge Flaum points out that the court in that case actually states that primary line cases are "clearly distinguishable from suits filed by a local purchaser against a manufacturer, where competition between purchasers

is of course essential to actionable price discrimination * * *." 269 F.2d at 954.

Therefore, plaintiff must allege and demonstrate that he was a disfavored purchaser who competed with favored purchasers, and was injured as a result. And since plaintiff has not adequately challenged the validity of defendant's exclusive territorial restraints (see discussion of Counts II and IV below), plaintiff must prove this competition to obtain a remedy despite the fact that defendant may have imposed or encouraged territorial restraints that may have made competition among distributors unlikely.

Plaintiff alleged that he did show harm resulting from "secondary price discrimination" since he lost sales in Benton Harbor, Michigan, where another distributor had a better discount. Questioning at oral argument attempted to elicit the scope and breadth of that competition, and from that questioning, it seems that the right to an exclusive dealership in the Benton Harbor area was in dispute, and that defendant finally told plaintiff that it was operating outside of its territory. More importantly, though, plaintiff could not detail the extent of its activity in the Benton Harbor area, the customers he would have been able to deal with absent the discriminatory price, or an estimate of sales actually lost. Thus, plaintiff has not alleged that its sales lost due to secondary price discrimination were more than "de minimus," or that they even potentially existed. Yet this court has required such a showing, for if there exists only "de minimus" or sporadic competition, it is unlikely that a "lessening of competition" or "tendency to create a monopoly" will occur. *Universal Rundle Co.* v. *Federal Trade Comm.*, 382 F.2d 285, 287 (7th Cir. 1967); *Whitaker Cable Corp.* v. *Federal Trade Comm.*, 239 F.2d 253, 256 (7th Cir.), *cert. denied*, 353 U.S. 938 (1956).

Finally, plaintiff's contention that its competition with defendant in sales to institutional buyers resulted in a showing of "primary line discrimination" for which recovery is possible, fails. The exclusive distributorship

did not apply to sales to "institutions," *i.e.*, airlines, restaurants, etc. Both plaintiff and defendant sold to them, or rather to jobbers who sold to them, in the same Chicago area. First, this argument was initially made in plaintiff's opposition to the summary judgment motion, and being unnecessarily delayed, is not properly before this court. Second, there is no showing here of the extent of lost sales, and no connection is demonstrated between defendant's discriminatory sales to other territorial distributors, and defendant's ability or intent to prevent plaintiff from obtaining a superior competitive position vis a vis defendant in institutional sales. In *Crest Auto Supplies Inc.*, v. *Ero Mfg. Co.*, 360 F.2d 896, 901 (7th Cir. 1966), the fact that plaintiff failed to allege "any competitive effect or competition in any sense, nor set forth any facts concerning the unspecified discrimination from which such competitive effect may be inferred," resulted in dismissal of the Robinson-Patman claims from plaintiff's complaint. In addition, Judge Flaum thought it inherently impossible for illegal competition to exist where a manufacturer competes directly with his own distributor. That is his privilege, according to *Chicago Sugar Co.* v. *American Sugar Refining Co.*, *supra*, at 10.

Restrictive Agreements

Counts II and IV are both based on agreements between plaintiff and defendant, agreements which plaintiff alleges impose illegal restrictions on him. Count II involves an agreement between plaintiff and defendant in which plaintiff was forbidden from selling bakery products manufactured by anyone other than defendant, unless that "foreign" bakery product was bought through the defendant. Plaintiff alleges that this is a restraint and product "tie in" that is a *per se* violation of Sherman § 1 and Clayton § 3, 15 U.S.C. §§ 1, 14. Damage claimed is the difference between the higher prices plaintiff paid defendant for outsiders' bakery products (a 26 percent trade discount) and the lower price that would have been paid had plaintiff bought

directly from the manufacturer (a 40 percent trade discount). Damages total $16,800.

Count IV concerns both this restriction and a non-competition agreement under which plaintiff agreed (1) not to sell defendant's products outside its defined territory, and (2) to refrain from competition with defendant within a 100-mile radius of plaintiff's place of business for a period of one year after termination of his distributorship. Count IV also avers that the exclusive dealing agreement alleged in Count II, taken in conjunction with the price-fixing and marketing restraints imposed by defendant, was part of an illegal price-fixing scheme and/or pattern of practice of defendant to control and fix the products' prices and the distributive practices under which they were sold. In Count IV, plaintiff seeks damages of $35,000 by reason of the exclusive dealing agreement and $20,000 due to the covenant not to compete. Plaintiff also sought injunctive relief in his initial complaint.

The allegations requesting an injunction against defendant's vertical price-fixing schemes were dismissed from Count IV by Judge Austin in his order of October 29, 1974, since plaintiff had not alleged any threat of present or future loss to himself as 15 U.S.C. § 26 requires. In that order, Judge Austin provided that "the other aspects of Count IV * * * will stand." These "other aspects" are the only remaining issues for discussion here; they are the exclusive dealing agreement and the covenant not to compete. The price-fixing claim is not properly before this court.

Plaintiff is not entitled to damages due to these agreements because he fails to allege violations of section 3 of the Clayton Act and section 1 of the Sherman Act that would entitle him to damages. Section 3 of the Clayton Act makes wrongful any contract for the sale of goods, or a fixed price or rebate on such a contract, on condition that the lessee or purchaser shall not use or deal in goods of a competitor of the lessor or seller, where the effect of such a sale, lease or contract would tend to create a

monopoly in any line of commerce. 15 U.S.C. § 14. And courts have held that agreements with manufacturers that limit distributors' sales to products made by the manufacturer are not *per se* violations of antitrust law. Such an agreement is barred by section 3 of the Clayton Act only if its effect "may be to substantially lessen competition or tend to create a monopoly in a line of commerce." In *White Motor* v. *United States,* 372 U.S. 253 (1963), summary judgment had been granted plaintiff below, on the theory that defendant's franchise contracts were *per se* violations of Sherman Act §§ 1 and 3. The Supreme Court reversed and remanded, saying:

> * * * We do not know enough of the economic and business stuff out of which these arrangements [vertical territorial limitations] emerge to be certain [that their sole purpose is to stifle competition]. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business [citations omitted] * * *. We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack * * *any redeeming virtue" [*Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 5 (1956)] * * *. [372 U.S. at 263]

This reasoning holds true today. *Pitchford* v. *Pepi, Inc.,* 531 F.2d 92 (3d Cir. 1975), *cert. denied,* 426 U.S. 935 (1976); *Giant Paper & Film Co.* v. *Albermarle,* 430 F.Supp. 981, 984 (S.D.N.Y. 1977).

Therefore, plaintiff must allege some facts to demonstrate that defendant's marketing practices foreclosed competitors of the defendant from a substantial market. But as defendant noted, the trial court found that plaintiff was totally unaware of the share of the relevant market foreclosed by the exclusive dealing agreement. The court in *Becker* v. *Safelite Glass Corp.,* 244 F.Supp. 625, 639 (D. Kan. 1965), granted summary judgment for this

reason alone. *See also Mercantile National Bank of Chicago* v. *Quest, Inc.,* 303 F.Supp. 926, 934-35 (N.D. Ind. 1969) (plaintiffs had not proved an antitrust violation since they presented no evidence of plaintiffs' position in the relevant market).

Also, clauses restricting distributors after termination of contracts are legal unless unreasonable as to time or scope. *Snap-On-Tools Corp.* v. *Federal Trade Comm.,* 321 F.2d 825, 837 (7th Cir. 1963). Plaintiff's complaint never alleges that the distributorship restriction was unreasonable; thus, he has not claimed that this restriction violates the antitrust laws in any manner.

Finally, there is no illegal tie-in arrangement in this case. Tying agreements were made illegal under the Sherman Act to prevent the anticompetitive occurrence of a party dominant in one market (the tying market) controlling another market (the tied market) via his competitive advantages in the tying market. *Times Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 605 (1952). Given this policy, then, for a party to establish a violation of the antitrust laws using a tying arrangement theory, he must demonstrate that there exists (a) two separate markets for the tied and tying product, *Siegel* v. *Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir.), *cert. denied* 405 U.S. 955 (1971); and (b) a requirement that plaintiff buy a tied product as a condition of obtaining access to or a concession from defendant in the tied market. *Capital Temporaries, Inc. of Hartford* v. *Olsten Corp.,* 506 F.2d 658 (2d Cir. 1974); *Holleb & Co.* v. *Product Terminal Cold Storage Co.,* 532 F.2d 29 (7th Cir. 1976). There is only one market here (ethnic bakery products) and plaintiff alleges no instance when defendant forced him to purchase one product as a condition of buying another.

In determining that defendant is entitled to summary judgment on all four counts, we realize that the plaintiff may have been harmed due to defendant's business practices. But plaintiff cannot recover under the antitrust laws, because he has not raised any issue of fact indicat-

ing that defendant's anticompetitive practices caused injury to plaintiff's competitive position. Plaintiff must raise these issues of fact successfully to oppose defendant's motion for summary judgment. It is the focus on the maintenance of competition that is the basis for the antitrust laws, their remedies, and the requirements for parties to recover under them. Plaintiff fails to raise any issue of fact showing that he meets the requirements for antitrust recovery, so the decision of the lower court granting summary judgment to defendant is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 72 C 738
EDWARD Q. LUPIA,
individually and for and on behalf, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of other distributors of Stella D'Oro Biscuit Co., Inc., a New York corporation, similarly situated, as a class,

Plaintiff,

vs.

STELLA D'ORO BISCUIT CO., INC.,
a New York Corporation,

Defendant.

MEMORANDUM OPINION

Joel M. Flaum, *District Judge*:

Before the court are cross motions for summary judgment filed pursuant to Fed. R. Civ. P. 56. Plaintiff, a former exclusive distributor of defendant, Stella D'Oro Biscuit Co., Inc. which is a New York corporation engaged in the manufacture and sale of cookies, biscuits and breadsticks, filed this antitrust action alleging violations of the Robinson-Patman Act §§ 2(a), (c), 15 U.S.C. §§ 13(a), (c); the Sherman Act §§ 1, 2, *id.* §§ 1, 2; and the Clayton Act § 3, *id.* § 14. After considering the extensive memoranda filed by the parties this court is of the opinion that there are no genuine issues of material fact and that summary judgment is properly entered on behalf of defendant, Stella D'Oro.

A. Count I

Count I alleges that plaintiff was the exclusive distributor of defendant's products in the Chicagoland area including parts of Northern Illinois, Southern Wisconsin, Northern Indiana, and Southern Michigan. Pursuant to an agreement between the parties, plaintiff was contractually obligated to sell defendant's products and was barred from distributing the products of any other baking firm whether or not that firm competed with Stella D'Oro.

Plaintiff alleges that defendant sold its products to plaintiff at defendant's fixed wholesale prices less a 26 percent trade discount. Plaintiff thereupon sold defendant's baking goods to driver route salesmen, who in turn sold to the individual retail stores, at a price of the retailer's wholesale prices fixed by defendant less a 17 percent trade discount. Thus, the 9 percent differential between the 26 percent trade discount defendant gave plaintiff and the 17 percent trade discount plaintiff gave his driver route salesmen represented plaintiff's gross profits.

The gravamen of plaintiff's complaint in count I is that for years defendant had granted retail chain stores a 5 percent discount in price which was not given to independent retailers of defendant's goods, and that plaintiff had been forced to "eat" and accept these discounts granted chain store retailers. Plaintiff alleges that this 5 percent "charge back" occurred through defendant's system of centralized billing for chain store retailers. While in plaintiff's normal practice the driver route salesmen would sell defendant's products to individual retail stores and would collect the retail wholesale price fixed by defendant less 17 percent, in the case of chain store retailers, the driver route salesmen would return to plaintiff a copy of a sale and delivery invoice which in turn was transmitted by plaintiff to defendant in New York. The driver route salesmen would generally compensate themselves for the sales to chain stores by deducting their 17 percent discount from cash sales to independent retailers prior to

remittance to plaintiff. Plaintiff alleges that defendant would then bill the chain stores directly at a price of the retailer's wholesale price less a 5 percent discount. This net billing allegedly was paid by the chain store retailers to the defendant and defendant, in its weekly billing to plaintiff, would charge plaintiff's account for said 5 percent discount to chain stores.

Although count I raises numerous allegations of retail price maintenance by defendant Stella D'Oro,[1] plaintiff only contends that the aforementioned facts constitute violations of the price discrimination and brokerage provisions of the Robinson-Patman Act §§ 2(a), (c), 15 U.S.C. §§ 13(a), (c). Plaintiff asserts that in its discrimination in price between chain store and independent retailers, defendant has violated section 2(a) which prohibits unjustified price concessions to certain buyers of a seller's goods.[2] Moreover, plaintiff contends that the charging back to his

[1] As this court noted in an unpublished memorandum opinion dated September 3, 1976, and as Judge Austin ruled on October 29, 1974, plaintiff has not alleged any injury from the alleged retail price maintenance by Stella D'Oro. Thus, no issue concerning retail price maintenance is before this court.

[2] Section 2(a) provides:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . and where the effect of such discrimination may be substantially to lesson competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).

account by Stella D'Oro of the 5 percent chain store discount constituted illegal "brokerage" prohibited by section 2(c).[3]

1. Plaintiff's Section 2(a) Claim

Defendant presents two arguments in support of its motion for summary judgment on count I: first, that as a matter of law plaintiff lacks standing to challenge any price discrimination imposed by defendant on retailers; and second, that plaintiff has suffered no injury from any alleged price discrimination imposed by defendant on its retailers. The Clayton Act § 4, 15 U.S.C. § 15,[4] the general "standing" requirements provision of the federal antitrust laws, provides that a plaintiff must allege that he has been injured by the complained of antitrust violation. *See Kirby* v. *P. R. Mallory & Co.*, 489 F.2d 904, 910-12 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974). Thus, the cases have recognized that a plaintiff must be injured within the "target area" of the alleged antitrust violation and that the plaintiff must suffer "antitrust" or "com-

[3] Section 2(c) provides:

> (c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance of discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person to whom such compensation is so granted or paid.

15 U.S.C. § 13(c).

[4] Section 4 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . .

15 U.S.C. § 15.

petitive" injury. An antitrust plaintiff must be within the area " 'of the economy which is endangered by a breakdown of competitive conditions in a particular industry.' " *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122, 128 (9th Cir. 1973), *cert. denied sub. nom., Morgan* v. *Automobile Mfg. Ass'n,* 414 U.S. 1045 (1973), *quoting Conference of Studio Unions* v. *Lowe's Inc.,* 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952). *See also GAF Corp.* v. *Circle Floor Co., Inc.,* 463 F.2d 752 (2d Cir. 1972), *cert. denied,* 413 U.S. 901 (1973). *Cf. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 97 S.Ct. 690 (1977).

In the case at bar, this court must agree that plaintiff lacks standing to challenge any price discrimination imposed on independent retailers of defendant's bakery products. Plaintiff, in count I, alleges a "secondary-line" price discrimination[5] in which similarly situated retailers in competition with each other are charged different prices by the same supplier. Thus, the "breakdown of competitive conditions" occurs not in plaintiff's wholesale market, but rather in the retail level where chain stores are given an allegedly unjustified advantage over independent retailers in the marketing of defendant's products to consumers. As the court in *Bolick-Gillman Co.* v. *Continental Bakery Co.,* 206 F.Supp. 151 (D. Nev. 1961), recognized:

> We have no doubt that the essence of a secondary-line case is the injury to *competing buyers from the same seller.* . . .[W]e are satisfied that a plaintiff, when suing to enforce the Act on a theory of injury to secondary-line competition, must allege and show

[5] A secondary-line discrimination occurs when a supplier charges different prices to similarly situated buyers in competition with each other. A primary-line discrimination occurs when a supplier charges different prices to various buyers, even if they are not competitors, and such discrimination causes injury to competitors of the supplier. *See* Thomas v. Amerada Hess Corp., 393 F.Supp. 58 (M.D. Penn. 1975).

> that he was a purchaser from the defendant *and that he was in competition with one or all of the favored dealers.*

Id. at 154 (emphasis supplied). *See also Boysen, Inc.,* v. *H. P. Hood & Sons, Inc.,* 1964 CCH Trade Cases ¶ 71,168, at 79,638 (D. Conn. 1964); *Sam S. Goldstein Indus., Inc.* v. *General Electric Co.,* 264 F.Supp. 403, 407 (S.D. N.Y. 1967). Rather than plaintiff Lupia bringing count I of the complaint alleging violations of section 2(a), an independent retailer would be the proper party to redress the alleged illegal price advantage given to its competitors, the chain store retailers.

Furthermore, even if plaintiff could be considered within the "target area" of the section 2(a) violation alleged in count I, the court must agree with defendant's second argument that plaintiff has suffered no injury from the alleged price discrimination between chain store and independent retailers. Although plaintiff asserts that he was injured to the extent of the 5 percent discount to chain stores he was forced to "eat" by defendant's charging back of this discount to his account, plaintiff does not allege, nor does he present evidence to raise even a genuine issue of fact, that he could have sold at all to the chain stores but for the 5 percent discount. Thus, as defendant points out, plaintiff has conceded several times at deposition that he does not know, nor did he try to determine, whether the chain stores would have purchased defendant's products if the entire wholesale price was charged. While this fact would, of course, be irrelevant if an individual retailer was the plaintiff in this cause,[6] in the case at bar it is fatal to plaintiff Lupia's section 2(a) claim in count I. Accordingly, there being no genuine issue of material fact, summary judgment on Lupia's section 2(a) claim in count I is granted for defendant.

[6] Thus, it would be no defense in a section 2(a) case brought by a competing buyer of a favored buyer that the favored buyer demanded the price preference.

2. Plaintiff's Section 2(c) claim

As recognized by the Supreme Court in *FTC* v. *Broch & Co.,* 363 U.S. 166 (1960):

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the [Robinson-Patman] Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.

Id. at 169 (footnotes omitted). Section 2(c) is designed not to outlaw all price discriminations (which generally are governed by section 2(a) principles), *Empire Rayon Yarn Co.* v. *American Viscose Corp.,* 364 F.2d 491, 492-3 (2d Cir. 1966) (en banc), *cert. denied,* 385 U.S. 1002 (1967); *Robinson* v. *Stanley Home Products, Inc.,* 272 F.2d 601, 603-04 (1st Cir. 1959), but rather to prevent the giving of discounts or commissions by one party to the other party in the transaction as a "substitute payment" for brokerage fees which are unearned. *Ideal Plumbing Co.* v. *Benco, Inc.,* 529 F.2d 972, 977 (8th Cir. 1976). *See also Thomas* v. *Amerada Hess Corp.,* 393 F.Supp. 58, 74-76 (M.D. Penn. 1975). Moreover, the Seventh Circuit has recognized that section 2(c) not only prevents unlawful brokerage payments induced by buyers for their benefit, but also that sellers who require commissions or kickbacks before they consummate a transaction are violating section 2(c)'s mandate. *Grace* v. *E. J. Kozin Co.,* 538 F.2d 170, 173 (7th Cir. 1976).

In the case at bar, however, this court must agree with defendant that plaintiff's allegations of "brokerage" are conclusory and that plaintiff can not present evidence

showing that the alleged discrimination by defendant between retail stores, and the commitment charging back of these discounts to plaintiff, constitutes anything but a standard price discrimination charge governed not by section 2(c) but by section 2(a). Although plaintiff in his memorandum asserts that the 5 percent discount charged back to plaintiff was an illegal kickback, plaintiff presents no evidence that such 5 percent was in "lieu of brokerage" or for the purpose of consummating any sale. In fact, in his deposition, plaintiff was not able to state in what way the 5 percent charge back constituted brokerage.

Thus, since plaintiff has failed to cite any authority for the proposition that a price discriminator can also be the party obtaining the alleged brokerage,[7] and since there is no genuine issue of material fact that any 5 percent charge back did not constitute brokerage or a commission in lieu of brokerage, defendant's motion for summary judgment on plaintiff's 2(c) claim in count I is granted.

B. Count III

In count III, plaintiff again alleges the existence of an illegal section 2(a) price discrimination. Thus, plaintiff alleges that defendant Stella D'Oro granted a 3 percent price advantage to other wholesalers of defendant's products by granting them a 29 percent trade discount while granting plaintiff the aforementioned 26 percent trade discount. Plaintiff alleges that there is no functional reason for the disparity in price, and that therefore section 2(a) has been violated.

In response to plaintiff's allegations, defendant contends that in order for a section 2(a) case to be made out alleging a "secondary-line" discrimination,[8] a plaintiff

[7] In all the cases cited by plaintiff, including the commercial bribery cases brought under 2(c), the plaintiffs alleged and showed that the payments made were in lieu of brokerage or as a commission for the purpose of consummating a sale. *See, e.g.,* Friedman v. Philadelphia Terminals Auction Co., 145 F.Supp. 820, 822-23 (E.D. Penn. 1956).

[8] *See* note 5 *supra.*

must allege and prove that the favored and discriminated against purchasers were in competition with each other. Defendant argues that plaintiff Lupia has not alleged that such competition existed, since as plaintiff concedes he had an exclusive territory, and that in fact no such competition existed. Plaintiff challenges defendant's position arguing: first, that there is no need for competition between discriminated against purchasers and favored buyers of defendant's products; second, that defendant is estopped to raise the lack of any competition because of the territorial restraints defendant imposed on plaintiff; and third, that competition exists in fact in both the secondary *and* primary level of the distribution of defendant's products.

It is clear to this court, however, that defendant's position is well taken and that plaintiff's contentions do not sustain count III under a section 2(a) theory. First, the authorities are legion that an essential element of a section 2(a) secondary-line price discrimination case is the existence of competition between a favored buyer of defendant's products and the discriminated against buyer. *See, e.g., American Oil Co.* v. *McMullen,* 508 F.2d 1345, 1353 (10th Cir. 1975); *Ag-Chem-Equipment Co.* v. *Hahn, Inc.,* 350 F.Supp. 1044, 1050 (D. Minn. 1972), *aff'd and vacated in part on other grounds,* 480 F.2d 482 (8th Cir. 1973); *Universal-Rundle Corp.* v. *FTC,* 1967 CCH Trade Cases ¶ 72,193, at 84,287 (7th Cir. 1967); *Bales* v. *Kansas City Star Co.,* 336 F.2d 439, 444 (8th Cir. 1964); *Auto Imports, Ltd.* v. *Peugeot, Inc.,* 1964 CCH Trade Cases ¶ 71,098, at 79,339 (S.D.N.Y. 1964); *Carlo C. Gelardi Corp.* v. *Miller Brew. Co.,* 421 F.Supp. 237, 246 (D. N.J. 1976); *Merit Motors, Inc.* v. *Chrysler Corp.,* 1976-1 CCH Trade Cases ¶ 60,959, at 69,245 (D. D.C. 1976); *Thomas* v. *Amerada Hess Corp.,* 393 F.Supp. 58, 75 (M.D. Penn. 1975); *Bel Air Markets* v. *Foremost Dairies, Inc.,* 55 F.R.D. 538, 540-41 (N.D. Cal. 1972); *Webster* v. *Sinclair Refining Co.,* 1972 CCH Trade Cases ¶ 74,023, at 92,244 (D. Ala. 1971); *Ingram* v. *Phillips Petroleum Co.,* 259 F.Supp. 176, 182 (D. N. Mex. 1966). *See generally,* 4 J. von Kalinowski, Antitrust Laws & Trade Regulation § 30.02 [3], at 30-71

to -79 (1976). In support of its position that no competition is required, however, plaintiff merely cites "primary-line" discrimination cases in which the plaintiff is not a disfavored buyer of defendant's products, but rather a competitor of defendant whose competition is being injured by the discriminating pricing by the defendant. *See, e.g., FTC* v. *Anheuser-Busch, Inc.,* 363 U.S. 536, 542-43 (1960); *Lloyd A. Fry Roofing Co.* v. *FTC,* 371 F.2d 277, 281-82 (7th Cir. 1966). Plaintiff has not cited to this court a single secondary-line discrimination case in which a court has held that competition between buyers is not a prerequisite to a section 2(a) action. In fact, in one of the primary-line discrimination cases cited by the plaintiff to support his proposition, *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.,* 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960), the court expressly recognized that primary-line cases are "clearly distinguishable from suits filed by a local purchaser against a manufacturer, where competition between purchasers is of course essential to actionable price discrimination. . . ." *Id.* at 954.

Second, this court does not agree with plaintiff's unsupported assertion that because defendant had established exclusive territories for its wholesalers that it is somehow estopped from claiming that plaintiff's section 2(a) claim is defective due to lack of competition between plaintiff and the favored distributors. Thus, in both *Bales* v. *Kansas City Star Co.,* 336 F.2d 439 (8th Cir. 1964), and *Auto Imports, Ltd.* v. *Peugeot, Inc.,* 1964 CCH Trade Cases ¶ 71,098, at 79,335 (S.D. N.Y. 1964), the courts recognized that even if there are territorial restrictions on a buyer's resale market, to sustain a section 2(a) claim the disfavored buyer had to compete with the favored buyer. This court agrees, in this case, with this analysis in as much as plaintiff has not challenged the validity of defendant's exclusive territorial restrictions.[9] Such re-

[9] Thus, plaintiff has not alleged that he has suffered any injury from an illegal verticle territorial allocation. *See* note 1 *supra.*

strictions can be challenged under the Sherman Act § 1, 15 U.S.C. § 1. *See, e.g., White Motor Co.* v. *United States,* 372 U.S. 253 (1963). However, where no such section 1 claim is made, this court will not permit the question to be raised in what is otherwise structured as a Robinson-Patman § 2(a) action.[10]

Finally, plaintiff argues that there are genuine issues of material fact that there does exist competition between plaintiff and favored distributors on the secondary-line level, and between plaintiff and defendant on the primary-line level. As to the latter argument, plaintiff contends that both the defendant and plaintiff sell to the same "institutional jobbers" and "wholesale grocers" in the same market area, and therefore defendant and plaintiff are primary-line competitors.

Initially it should be noted that none of the aforementioned allegations concerning institutional jobbers or wholesale grocers are in plaintiff's amended complaints but rather are presented for the first time in plaintiff's long and conclusory "affidavit" in support of its motion and in opposition to defendant's motion for summary judgment.[11] Thus, their allegations are not properly before the court. However, even if these claims were properly presented, it is clear that no section 2(a) primary-

[10] It should be noted that under the *White Motor Co.* decision cited in the text, verticle territorial restraints are only invalid if they violate the rule of reason standard of the Sherman Act § 1. Thus, this court will not presume such restraints invalid for the purpose of establishing plaintiff's section 2(a) claim of unlawful discrimination.

[11] On September 3, 1976, this court struck plaintiff's 63 page "affidavit" as being improper in form as well as conclusory and replete with legal arguments. In an effort to rectify the deficiency in its affidavit, plaintiff filed a "Second Supplemental Affidavit" which merely incorporated the prior affidavit by reference. Although this court has decided to review the record on its own in addressing the present motions, the court notes the general inadequacy of plaintiff's "Second Supplemental Affidavit" to correct the problems raised by the court in its September 3, 1976 ruling.

line case has been alleged or shown since plaintiff has not suggested that defendant has discriminated in price between institutional buyers for the purpose of injuring plaintiff as a competitor of defendant. *See, e.g., Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.,* 269 F.2d 950 (10th Cir. 1959). Moreover, plaintiff could not show any injury to competition in the case of sales by defendant to institutional jobbers because it is impossible for plaintiff to compete for sales with the company *from which* plaintiff purchases its products. As the Seventh Circuit recognized long ago, there is no section 2(a) violation when a manufacturer sells directly to consumers to which a wholesaler also sells. *Chicago Sugar Co.* v. *American Sugar Refining Co.,* 176 F.2d 1, 10-11 (7th Cir. 1949), *cert. denied,* 338 U.S. 948 (1950). *See also American Oil Co.* v. *McMullen,* 508 F.2d 1345, 1353 (10th Cir. 1975). Accordingly, a primary-line section 2(a) claim has not been established by plaintiff.

As to the secondary-line competition, plaintiff argues that between 1965 and 1967 plaintiff was selling and distributing products made by defendant to retail stores in the Benton Harbor-St. Joseph, Michigan area and that during that period plaintiff was competing with another distributor of defendant's goods who was receiving a greater discount from defendant than was plaintiff. Plaintiff alleges that his total sales in that territory were approximately $100 to $150 per week. However, this court must agree that there is no genuine issue of material fact as to whether such sales took place and the nature of plaintiff's competition with the other distributor. Again, plaintiff's deposition shows that he has no evidence that the other distributor was selling to the same stores plaintiff distributed to, and plaintiff's conclusory "affidavit" does not create a genuine issue of fact on this question.

Moreover, even if such a genuine issue of fact existed, it is clear to this court that any injury to competition in the Benton Harbor, Michigan area was de minimus in light of the small amount of the relevant market affected by defendant's alleged actions; only a fraction of 1 per-

cent of plaintiff's total sales of $1 million per year. As the Seventh Circuit, and other courts have recognized, when there is only de minimus affects on competition on the fringes of territories, a section 2(a) claim will not lie. *See National Dairy Products Corp.* v. *FTC,* 395 F.2d 517, 523 (7th Cir. 1968), *cert. denied,* 393 U.S. 977 (1968); *Universal-Rundle Corp.* v. *FTC,* 1967 CCH Trade Cases ¶ 72,194, at 84,287 (7th Cir. 1967); 4 J. Von Kalinowski, Antitrust Laws & Trade Regulation § 30.02[3], at 30-73 (1976).

Therefore, there being no genuine issues of material fact relative to count III of plaintiff's complaint, defendant's motion for summary judgment is granted.

C. Counts II and IV

Counts II and IV of plaintiff's complaint allege essentially the same factual situations challenging two contractual restraints in the distributorship agreement between plaintiff and defendant: (1) that plaintiff is forbidden from selling any baking products manufactured by a bakery other than Stella D'Oro unless they purchase the products through Stella O'Oro; and (2) that plaintiff will not compete with Stella D'Oro for a period of one year after termination of his distributorship within a 100 mile radius of plaintiff's place of business. Plaintiff claims that these various restraints violate the Clayton Act § 3, the Robinson-Patman Act § 2(c), and the Sherman Act § 1.

1. The Exclusive Distributorship Restraint.

As to plaintiff's claim that the exclusive distributorship arrangement violates the Clayton Act § 3, 15, U.S.C. § 14,[12] plaintiff argues first that such a restraint is *per*

[12] Section 3 provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption,

se illegal and that it also constitutes an invalid tie-in arrangement. However, as defendant properly shows, both arguments are without merit. First, it is clear that for an exclusive distributorship arrangement to be illegal under section 3 of the Clayton Act,[13] the plaintiff must allege and establish that the restriction suffers "the qualifying disability, tendency to work a substantial—not remote—lessening of competition in the relevant competitive market." *Tampa Electric Co.* v. *Nashville Co.,* 365 U.S. 320, 333 (1961). *See also Bowen* v. *New York News, Inc.,* 366 F.Supp. 651, 679-80 (S.D. N.Y. 1973), *modified,* 522 F.2d 1242 (2d Cir. 1975), *cert. denied,* 425 U.S. 936 (1976). In *Bowen,* the court recognized that the "test is whether the system of challenged exclusive arrangements in fact forecloses competitors [of the defendant] from a substantial market." *Id.* at 679. In the case at bar, however, defendant shows, and plaintiff does not dispute, that plaintiff is totally unaware of the share of the relevant market foreclosed to defendant's competitors by the exclusive distributorship arrangement present in this suit. *Becker* v. *Safelite Glass Corp.,* 244 F.Supp. 625, 639-40

[12] (Continued)

> or resale within the United States . . . or fix a price charged therefore, or discount from, or rebate upon, such prices, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale of such condition, agreement, or understanding may or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

[13] As the courts have held, unless a section 3 violation is shown there also cannot be a section 1 Sherman Act claim established. *See* Tampa Electric Co. v. Nashville Co., 365 U.S. 320, 335 (1961); Becker v. Safelite Glass Corp., 244 F.Supp. 625, 640-41 (D. Kan. 1965). Thus, since as the text of this opinion establishes that plaintiff's section 3 claim must fail, his section 1 claim is likewise defective.

(D. Kan. 1965). Moreover, as defendant points out, giving the narrowest scope to the relevant market involved in this case, less than .003 percent of that market would be foreclosed by defendant's restriction on plaintiff, an amount which clearly does not tend to work a substantial lessening of competition in the relevant market. *See, e.g., Perryton Wholesale, Inc.* v. *Pioneer Distributing Co.,* 353 F.2d 618, 624 (10th Cir. 1965).

Second, no illegal tie-in arrangement is properly alleged since plaintiff neither suggests nor presents evidence to indicate that defendant required plaintiff to purchase one product (the "tied" product) in order to purchase another product sold by defendant (the "tying" product). The Seventh Circuit has recently stated that:

> An illegal tying agreement results when the seller requires the buyer to purchase in addition to the desired product another less desirable product with the potential effect that competition in the tied product would be lessened.

Holleb & Co. v. *Product Terminal Cold Storage Co.,* 532 F.2d 29, 32 (7th Cir. 1976). Since plaintiff does not contradict the assertion that he was free to purchase each of the products sold by defendant[14] separately, his tie-in charge must fail.

Finally, plaintiff contends that the brokerage provision of section 2(c) of the Robinson-Patman Act has been violated by the exclusive distributorship arrangement. Plaintiff alleges that defendant purchased the bakery goods of other manufacturers at a 40 percent discount and resold them to plaintiff at a 26 percent discount. Plaintiff claims that this 14 percent differential pocketed by defendant is unlawful brokerage. However, as shown previously, section 2(c) is not a catch-all antitrust provision invalidating all restraints normally controlled by other antitrust provisions. Thus, section 2(c), by its own terms, is only violated if a payment is made by one party to a transaction to the other party to the transaction or to his agent for the purpose of illegally consummating a transaction. *See FTC* v. *Broch & Co.,* 363 U.S. 166 (1960). However, in the case at bar, plaintiff does not allege or show that defendant was acting as an agent for either plaintiff or the other manufacturers of bakery goods sold by defendant to plaintiff, or that "brokerage" was paid in any way. *See Robinson* v. *Stanley Home Products, Inc.,* 272 F.2d 601, 603-04 (1st Cir. 1959). Plaintiff's conclusory allegations cannot withstand defendant's present motion for summary judgment on plaintiff's section 2(c) claim.

[14] *E.g.,* either the baking products made by Stella D'Oro or the products made by another manufacturer the defendant sold to plaintiff.

2. The Noncompetition Clause

In regard to plaintiff's claim that the "noncompete" restriction upon termination of his distributorship violates the antitrust laws, plaintiff only argues that such a restriction is *per se* illegal. However, the Seventh Circuit has recognized that such clauses must be examined under the rule of reason test of section 1 of the Sherman Act,[15] and "are legal unless they are unreasonable as to time or geographic scope." *Snap-on Tools Corp.* v. *FTC,* 321 F.2d 825, 837 (7th Cir. 1963). Since plaintiff does not

[15] Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, or restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

15 U.S.C. § 1.

allege unreasonableness, or present any evidence to that effect, his claim is fatally defective.

D. Conclusion

Accordingly, for the foregoing reasons, this court finding no genuine issue of material fact, summary judgment is entered on all counts on behalf of the defendant.

Joel M. Flaum
United States District Judge

Dated: May 31, 1977

No. 78-1252

In the
Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD Q. LUPIA,

Petitioner,

vs.

STELLA D'ORO BISCUIT CO., INC.,
a New York corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit are as yet unreported, but are set forth in full in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND RULES INVOLVED

The pertinent provisions of the Robinson-Patman Act (15 U.S.C. §13(a) and 13(b)); the Sherman Antitrust Act (15 U.S.C. §1); the Clayton Act (15 U.S.C. §§14 and 15) are set forth in the Petition at pp. 7-11. The pertinent provisions of the United States Supreme Court Rules (Rule 19) are set forth in this Responsive Brief at pp. 6-7.

ISSUES PRESENTED

1. Does a distributor have standing to sue under Sections 2(a) or 2(c) of the Robinson-Patman Act for discriminatory discounts allegedly given by his supplier to certain of the distributor's retail customers and absorbed by the distributor.

2. May a distributor recover damages for price discrimination in favor of other distributors where the distributor did not compete with the favored distributors in the same market area.

STATEMENT OF THE CASE

This case arises out of an antitrust complaint brought against Respondent, Stella D'Oro Biscuit Co., Inc., a manufacturer of cookies, biscuits, breadsticks and other bakery products. The complaint was filed by Petitioner, Edward Q. Lupia, an exclusive distributor of Stella D'Oro products in the Chicago metropolitan area from September, 1961 until December 31, 1971.

On March 27, 1975, Respondent moved in the District Court for summary judgment on all four counts of the complaint (App. 181)* on the following grounds: (i) Petitioner did not have standing to sue for the alleged antitrust violations against retailers and the discriminatory discount was not unlawful brokerage under Section 2(c) of the Robinson-Patman Act (15 U.S.C. §13(c)) (Count I); (ii) Petitioner could not show that substantial competition existed between him and favored distributors as required to recover under Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)) (Count III); and (iii) Petitioner could not show a reasonable probability that the exclusive dealing and non-competition provisions of his contract would substantially lessen competition in the relevant line of commerce as required by Section 3 of the Clayton Act (15 U.S.C. §14) and Section 1 of the Sherman Act (15 U.S.C. §1) (Counts II and IV). Respondent's motion was based on and supported by the complaint, as amended, Petitioner's answers to various sets of written interrogatories, deposition testimony and certain exhibits.

* "App" refers to the Appendix filed by the Petitioner in the Court of Appeals for the Seventh Circuit.

Thereafter, Petitioner filed a cross-motion for summary judgment on Count I and a partial summary judgment on Counts II, III and IV (App. 184). A lengthy Affidavit and subsequent Supplemental Affidavit were submitted by Petitioner both in support of his motion and in opposition to Respondent's motion (App. 189-266, 277). The District Court struck and dismissed Petitioner's affidavits as being improper (App. 292) and Petitioner filed a "Second Supplemental Affidavit" which was also objected to by Respondent (App. 302, SDO's App. 210)*.

On May 31, 1977, the District Court entered summary judgment in favor of Respondent on all counts (Appendix pp. 18a-34a).** In its memorandum opinion, the District

* "SDO's App." refers to Respondent's Supplemental Appendix filed in the Court of Appeals for the Seventh Circuit.

** "Appendix" refers to the Appendix filed in this Court by the Petitioner.

Judge stated that the "Second Supplemental Affidavit" had the same defects as the affidavits previously stricken (Appendix pp. 28a, note 11). Petitioner appealed to the Seventh Circuit Court of Appeals (App. 437) and on November 15, 1978, the Court of Appeals for the Seventh Circuit affirmed the district court's decision granting summary judgment in favor of Respondent on all counts.

STATEMENT OF FACTS

Petitioner's statement of facts is substantially one-sided. A more accurate treatment of the facts is found in the opinion of the district court and the Court of Appeals (Appendix pp. 1a-2a; 19a-20a).

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE NO GROUND EXISTS FOR THE GRANTING OF THE WRIT.

The exercise of certiorari jurisdiction has been a frequent subject of scholarly debate and pronouncements of this Court and its justices. In *Magnum Co.* v. *Coty,* 262 U.S. 159, 163 (1923), Chief Justice Taft, in much quoted language, stated:

> "The jurisdiction [of the Supreme Court to review cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

The Petition in the instant case falls within the category of cases referred to by Chief Justice Taft as outside the scope of Supreme Court review. The Petition does not even approach the standards for certiorari jurisdiction enumerated by this Court and by Supreme Court Rule 19. Supreme Court Rule 19 in its pertinent part provides:

> "Rule 19. Consideration governing review on certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * *
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of

appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . ."

Petitioner's reasons for seeking *certiorari* are conclusionary and no more than a rehash of the same arguments on the merits that were presented below. Petitioner has made no attempt to show the importance of the issues or demonstrate any of the considerations set forth in Rule 19. Rather, Petitioner merely states, without citation, that the lower court decisions "would emasculate and make a mockery of the remedial purpose and public policy considerations of Section 4 of the Clayton Act," alleging that the Court of Appeals "over-reacted" in this case to this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977) and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977). [Petition p. 35]

The decision of the Court of Appeals in this case is not novel, and no amount of verbosity can convert it into one warranting review by this Court on certiorari. The lower court decisions were predicated on a relatively unique set of facts whose outcome is limited to the parties. Further, taken in a *Robinson-Patman Act* context, this case is similar to this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977).

A. This Court And The Circuit Courts Of Appeal Have Uniformly Held That An Injury Should Reflect The Anticompetitive Effect Of The Violation.

Count I of Petitioner's complaint alleged that Respondent granted a five percent discount to certain retail chain store accounts, but not to other retail store accounts. Petitioner claimed that the discounts were discriminatory

and in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). Petitioner alleged that his damages equaled the discounts granted over a four-year period because he was charged with and had to absorb the full dollar amount of the discounts. The lower courts found that if there was an anti-competitive effect, the injury was suffered by those retail customers who did not receive the discount, and not the Petitioner.

The Court of Appeals concluded, relying upon, *inter alia, Brunswick Corp.* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, (1977) that Petitioner had not suffered an antitrust injury. The Petitioner could not recover for discounts he absorbed, merely because they may have been discriminatory or anticompetitive to someone else. As the Court of Appeals stated:

> "As regards 'antitrust injury,' plaintiff [Petitioner] does not pass the *Brunswick* test. The defendant's [Respondent's] anticompetitive action, the 5 percent rebate to chain stores, would have been equally anticompetitive if plaintiff [Petitioner] had not been required to absorb it. That he was so required is, therefore, not an 'anti-trust injury' but one reflecting harsh treatment of a distributor by a manufacturer. If defendant [Respondent] had absorbed the rebate, there would have been no injury, yet the anticompetitive nature of its policy would not have been affected one iota. So it is not an 'antitrust injury'. Judge Flaum found that plaintiff [Petitioner] was unable to raise an issue of fact that it could have sold to the chains without the rebate." (Appendix p. 8a)

Further, Petitioner was unable to show that, but for the discount, he would have been unable to sell any merchandise at all. Further, in answers to interrogatories propounded at deposition, Petitioner stated that (i) he could not have received a higher price for the discounted products, (ii)

he knew of no instance where he could have received a higher price, and (iii) he neither tried to obtain nor did any chain store account express a desire to pay a higher price for the products. Finally, Petitioner admitted that he knew of no customer who would have purchased the discounted goods at a higher price since the demand for Respondent's products was already filled. SDO's Appendix, pp. 137-147).

Relying upon the decisions of the Circuit Courts of Appeals, in *GAF* v. *Circle Floor Co., Inc.*, 463 F.2d 752, 757-759 (2nd Cir. 1972); *In Re Multidistrict Vehicle Air Pollution MDL No. 31,* 481 F.2d 122 (9th Cir. 1973); *Kirby* v. *P. R. Mallory & Co.*, 489 F.2d 904, 911 (7th Cir. 1973); *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51, 55 (9th Cir. 1951); *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731-732 (10th Cir. 1973); *Ragar* v. *T. J. Raney & Sons,* 388 F.Supp. 1184 (E.D.Ark. 1975) Aff'd. *per curiam* 521 F.2d 795 (8th Cir. 1975) the Court of Appeals also concluded that Petitioner could not show any injury because he could not show that he could have received a higher price for the discounted goods, as shown by the deposition and interrogatory answers on file.

Petitioner alleged, as an alternative ground for recovery in Count I, that Respondent's five percent discount was illegal brokerage prohibited by Section 2(c) of the Robinson-Patman Act (15 U.S.C. §13(c)). That provision, however, prohibits only the granting of brokerage or discounts in lieu of brokerage where brokerage services were not actually rendered. The Court of Appeals found from the record, that the discounts were straightforward and not disguised as brokerage, relying upon *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166 (1960).

Petitioner claimed that Section 2(c) covered all indirect price concessions. However, the Court of Appeals, relying upon *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 1959) disagreed. The Court of Appeals held that Section 2(c) outlawed only unearned brokerage fees *per se* in order to force sellers to confine their discriminatory practices to those dealings whose effect could be more readily measured by the competitive yardstick set forth in Section 2(a). Since the Petitioner had not shown how the discounts were brokerage or discounts in lieu of brokerage, the Court of Appeals properly denied the Section 2(c) claim, holding that the discounts were not disguised and must be tested under Section 2(a).

The Petitioner's assertion that the lower courts improperly disregarded his claims pursuant to Section 1 of the Sherman Act (15 U.S.C. §1) for vertical price fixing is without merit. Nowhere in Count I is an allegation made for recovery pursuant to Section 1 of the Sherman Act. It was only in Count IV of Petitioner's complaint that a vertical price fixing charge was alleged, but there was never a prayer for damages resulting from such alleged acts. In fact, the vertical price fixing charges were dismissed in the proceedings, as cited by the Court of Appeals (Appendix pp. 10a, 14a). Finally, even if vertical price fixing were properly before the lower courts, Petitioner has suffered no anti-competitive injury for the reasons set forth in the lower courts' opinions.

B. The Circuit Courts Of Appeal Have Uniformly Held That A Customer Alleging Price Discrimination Among Customers Must Show That He Competes In The Sale Of The Product With Those Customers Receiving A Favored Price.

Count III of Petitioner's complaint alleges that Respondent discriminated between its distributors in connection with the sale price of its merchandise. Specifically, Petitioner alleged that he had to pay a higher price (three percent more) than certain of Respondent's favored distributors, in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). Petitioner alleged that his damages equaled the difference between what he paid for Respondent's goods and what the favored distributors paid for the same goods between 1961 and 1971. The distributors, who allegedly received a lower price included distributors in Michigan, Pennsylvania, Ohio, Florida, Minnesota, Missouri, and others as far away as Texas, Oklahoma and Kansas.

As a distributor, Petitioner was no more than a customer of Respondent. As such, the Court of Appeals, relying upon *Mayer Paving and Asphalt Co.* v. *General Dynamics Corp.*, 486 F.2d 763, 770 (7th Cir. 1973) *certiorari denied* 414 U.S. 1146 (1974); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966); *Chicago Sugar* v. *American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949); *Collins Oil Co.* v. *Teneco, Inc.*, 556 F.2d 1274 (5th Cir. 1977); *American Oil Co.* v. *McMullin* 508 F.2d 1345, 1353 (10th Cir. 1975), held that substantial injury to competition must exist, and stated that this required:

> "[Petitioner] must allege and demonstrate that he was a disfavored purchaser who competed with favored purchasers and was injured as a result." (Appendix p. 12a)

On the basis of the facts presented by Petitioners, the Court of Appeals found that there was no evidence of competition between Petitioner and the favored distributors. In the one border area that Petitioner claimed to compete with a favored distributor, Petitioner could not detail the extent of his activity, the customers he would have been able to deal with absent the discriminatory price, or estimate the sales he actually lost. The Court of Appeals thus properly concluded, relying upon *Universal-Rundle Co.* v. *Federal Trade Commission*, 382 F.2d 285 (7th Cir. 1967), that such nebulous competition was "de minimus" or "sporadic" and that as such "it is unlikely that a 'lessening of competition' or 'tendency to create a monopoly' will occur." [citations omitted] (Appendix p. 12a)

In the District Court, the Court of Appeals, and now in his Petition, the Petitioner states "Section 2(a) still provides a remedy in an appropriate secondary-line case, even in the absence of competing purchasers". (Petition, page 56) Such a contention is totally unsupported in the case law. In fact, as previously cited, it has been uniformly held that competition between purchasers is essential in a secondary line case under Section 2(a) of the Robinson-Patman Act.

The Court of Appeals best described the fallacy of Petitioner's argument in its opinion, when it stated:

> "Cases cited by plaintiff [Petitioner] in support of the proposition that plaintiff [Petitioner] need not show that his own competitors are receiving a favored price are cases where the plaintiff was a competitor of the very defendant who is charging the

discriminatory prices. In these so-called "primary line" cases, the parties to whom defendant is granting favored prices need not be direct competitors of the plaintiff, since it is assumed that in that situation, defendant has the ability to seduce customers of plaintiff with an offer of lower prices while maintaining profits by a discriminatory charge of higher prices to "steady" or obligated customers. But this advantage of defendant is of no consequence to plaintiff if plaintiff does not compete with the defendant." (Appendix pp. 11a)

Petitioner argues that Respondent is estopped from asserting the lack of competition with favored distributors because of Respondent's alleged territorial restraints. Allegations of territorial restraint are not contained in Count III of the complaint. Further, even assuming the existence of territorial restraints, Petitioner is not excused from showing a competitive relationship with favored distributors. *Bales* v. *Kansas City Stock Co.*, 336 F.2d 439, 444 (8th Cir. 1964); *Auto Imports, Ltd.* v. *Peugeot, Inc.*, 1964 CCH Trade Cases, ¶71,098 (S.D.N.Y. 1964).

C. This Court And The Circuit Courts Of Appeal Have Uniformly Held That An Exclusive Dealing Agreement Is Barred By Section 3 Of The Clayton Act Only If Its Effect May Substantially Lessen Competition Or Tend To Create A Monopoly In Any Line Of Commerce.

Counts II and IV of the complaint allege that Petitioner was barred by his agreement with Respondent from selling products of other manufacturers unless purchased through Respondent in *per se* violation of Section 3 of the Clayton Act (15 U.S.C. §14) and Section 1 of the Sherman Act (15 U.S.C. §1). In addition, Petitioner claims

that the requirement to buy products through Respondent constitutes a tying arrangement in *per se* violation of Section 1 of the Sherman Act (15 U.S.C. §1).

The Court of Appeals, applying *White Motor Co.* v. *United States,* 372 U.S. 253 (1963) held that an exclusive agreement was not a *per se* violation of the antitrust law. Such an agreement would be barred by Section 3 of the Clayton Act only if its affect may be "to substantially lessen competition or tend to create a monopoly in any line of commerce". Since Petitioner was totally unaware of the share of the relevant market foreclosed by the exclusive dealing agreement and did not even allege facts to demonstrate that Respondent's marketing practices foreclosed competitors of Respondent from a substantial market, the Court of Appeals properly denied Petitioner's claim. *Pitchford* v. *Pepi, Inc.*, 531 F.2d 92 (3rd Cir. 1975) *certiorari denied* 426 U.S. 935 (1976); *Becker* v. *Safelite Glass Corp.*, 244 F.Supp. 625, 639 (D.Kan. 1965).

Regarding Petitioner's claim that there existed an illegal tying arrangement, the Court of Appeals properly pointed out that tying arrangements were made illegal to prevent a party dominant in one market (the tying market) from controlling another market (the tied market) by refusing to sell one product without the other. The Court of Appeals denied Petitioner's claim because there was only one market involved (bakery products) not two separate markets, and (ii) Petitioner was not required to purchase one product as a condition of buying the other. Such conclusion is in conformity with *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 605 (1953); *Seigel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir.) *certiorari denied* 405 U.S. 955 (1971); *Capital*

Temporaries, Inc. of Hartford v. *Olsten Corp.*, 506 F.2d 658 (2nd Cir. 1974); *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29 (7th Cir. 1976).

CONCLUSION

Petitioner fails to show any proper ground for the granting of certiorari in the instant case. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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